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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 85-5319

A-181

WILLIE JASPER DARDEN,
Petitioner,

v.

LOUIE L. WAINWRIGHT
as Secretary, Department of
Corrections, State of Florida
Respondent.

APPENDIX

To Petitioner's Application for Stay of Execution
Pending Review of Petition for Writ of Certiorari

To: THE HONORABLE LEWIS F. POWELL, JR., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit

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APPENDIX

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA ex rel. WILLIE JASPER DARDEN, Petitioner	
vs.	No. 79-366 Civ.T.-H
LOUIE L. WAINWRIGHT, Secretary, Division of Corrections, State of Florida, Respondent	

REPORT AND RECOMMENDATION

A state prisoner, Willie Jasper Darden, under sentence of death for murder brings this habeas corpus action attacking his conviction and his sentence on numerous grounds. After consideration of the state court records[1] and the evidence adduced at an evidentiary hearing,[2] and the extensive memoranda filed by the parties, I have concluded that two of petitioner's claims merit habeas corpus relief. After careful consideration of the remaining twenty-four claims, I find that they are without constitutional merit.[3]

BACKGROUND

On the evening of September 8, 1973, Mrs. Helen Turman was alone in her furniture store located in Lakeland, Florida. Sometime between 5:00 p.m. and 6:00 p.m. an individual came to the store and asked to look at some furniture and furnishings. After looking at a few items, the individual left, indicating that his wife would be in to the store. Sometime later, the same individual returned to the store, this time asking to look at ranges and stoves. While Mrs. Turman was figuring out the price

1. Reference to the trial transcript shall be designated herein: T-.

2. Reference to the evidentiary hearing shall be designated herein: H-.

3. In light of the ultimate recommendation that habeas corpus relief be granted, the twenty-four meritless claims will be treated in summary fashion in this report.

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of the items, the individual pulled a gun and demanded the contents of the cash register. It was at this point that Mrs. Turman's husband, Carl, unexpectedly walked into the store. The assailant responded to this interruption by shooting Carl Turman between the eyes at close range. The body dropped in the doorway, halfway in the store and half out.

With Mr. Turman lying dead or dying on the floor, the assailant ordered Mrs. Turman to get down on the floor. He then demanded that she remove her false teeth and perform oral sex on him. When she protested, he ordered her to stand up, and began walking her to the front of the store. A teenaged neighbor and parttime employee of the Turmans, Phillip Arnold, having heard the connection arrived at the store at this time. Not realizing what was going on, Phillip attempted to move Mr. Turman's body all the way into the shop. As the teenager bent over the body, the assailant shot him in the mouth. As the youth attempted to flee, he was shot in the neck and then in the side.

A short time later, some three miles from the site of the murder, assault and robbery, petitioner Willie Jasper Darden, who was on furlough from the Division of Corrections, lost control of the borrowed automobile he had been driving, and smashed into a telephone pole. Petitioner left the scene and returned to Tampa where he spent the night. He was initially arrested and charged with leaving the scene of an accident. Soon thereafter, he was arrested and charged with murder, assault with intent to commit murder, armed robbery, and assault with intent to commit rape. The grand jury returned indictments charging first degree murder, robbery and assault with intent to commit murder in the first degree. At all times petitioner has maintained that he was not present at the Turman's store and is innocent of the charges.

Both before and during trial, petitioner was identified as the assailant by Helen Turman and Phillip Arnold, eye-witness victims of the criminal episode. The trial jury found petitioner guilty of murder in the first degree, assault with intent to

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commit murder in the first degree, and robbery. After the second phase of the bifurcated trial, the jury recommended the imposition of the death penalty. After enumerating its findings of aggravating and mitigating circumstances, the trial court sentenced petitioner to death by electrocution.

POST-TRIAL HISTORY OF THE CASE

Petitioner took a direct appeal of his conviction to the Supreme Court of Florida. On February 18, 1976, the court affirmed the judgments and sentences. Darden v. State, 329 So.2d 287 (Fla. 1976). The Supreme Court of the United States granted petitioner's writ for certiorari on November 1, 1976, Darden v. Florida, 429 US 1036 (1977) on the sole issue of whether the prosecution's summation to the jury in the circumstances of this case deprived petitioner of due process of law, and thereafter dismissed the writ as improvidently granted on April 19, 1977. Darden v. Florida, 430 US 704 (1977).

Petitioner's sentence was the subject of a clemency hearing on March 30, 1978, and again on May 8, 1979. Petitioner filed a lawsuit in the Second Judicial Circuit, in and for Leon County, Florida, Darden v. Graham, et al, case no. 79-1193, seeking injunctive and declaratory relief with regards to the result of the clemency proceeding. Pursuant to Defendant's Motion to Dismiss, the Complaint was dismissed with prejudice on May 16, 1979. The Governor then signed Petitioner's death warrant on May 18, 1979, and on May 21, 1979, the Supreme Court of Florida affirmed the trial court's dismissal of May 16. Darden v. Graham, case no. 56,877.

Petitioner then filed two actions: (1) the habeas corpus petition which is the subject of the instant case, and (2) a Motion to Vacate, pursuant to Fla. R. Crim. P. 3.850, and a Motion for New Trial, pursuant to Fla. R. Crim. P. 3.600 (filed in the original action in this cause, State of Florida v. Darden, case no. 73-2027-C). A hearing was held on both motions on May 21, 1979. A motion to secure the presence of Darden at the

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hearing was denied and all motions on the merits, including a motion for stay of execution, were denied. (Court Exhibit No. 3) On May 22, 1979, the Supreme Court of Florida ffirmed the order of the trial judge and denied yet another application for stay of execution. Darden v. State, case no. 56,910

In his initial Petition for Writ of Habeas Corpus, filed with this Court, petitioner alleged two grounds:

(1) The prosecutor's closing argument was so fundamentally prejudicial and unfair that it deprived him of due process of law;

(2) The pre-trial identification of him by the victim's wife was so impermissibly suggestive that its admission into evidence deprived him of due process of law. (This claim was withdrawn and abandoned. Pretrial Stipulation Paragraph 3 b)

Based upon a review of the petition and the materials attached, this Court found that petitioner's constitutional assertions "were not facially frivilous in any sense, but indeed present substantial claims," and stayed petitioner's execution.

By means of interrogatories propounded to petitioner on July 3, 1979, respondent was able to ascertain that petitioner was also alleging the following constitutional claims in support of his petition for habeas corpus relief:

1. The execution of the petitioner's death sentence would violate the Eighth and Fourteenth Amendments of the Constitution of the United States because that sentence was imposed pursuant to a pattern of arbitrary and capricious capital sentencing;

2. Petitioner's execution would constitute excessive punishment in violation of the Eighth Amendment and a deprivation of life without due process of law under the Fourteenth Amendment because the justifications asserted to support the death penalty are factually insufficient to warrant the invasion of the fundamental right to life;

3. The death sentence imposed upon the petitioner constitutes a cruel and unusual punishment forbidden by the Eighth Amendment in that it constitutes the unnecessary infliction of

physical and psychological pain and torment;

4. Petitioner has been sentenced to die in violation of the Equal Protection clause of the Fourteenth Amendment because his death sentence was imposed pursuant to a pattern and practice of racial discrimination in capital sentencing;

5. Petitioner has been sentenced to die in violation of the Equal Protection Clause of the Fourteenth Amendment because his death sentence was imposed pursuant to a pattern and practice of discrimination against poor persons in capital sentencing;

6. Petitioner has been sentenced to die in violation of the Equal Protection Clause of the Fourteenth Amendment because his death sentence was imposed pursuant to a pattern and practice of inflicting capital punishment upon male offenders, and sparing similarly situated female offenders, on the sole ground of their respective sexes;

7. The death sentence imposed upon the petitioner constitutes cruel and unusual punishment forbidden by the Eighth Amendment because, considering all of the relevant circumstances of the offense and the offender, it is grossly disproportionate and excessive;

8. The death sentence imposed upon the Petitioner is inappropriate, improper and illegal because considering all of the relevant circumstances of the offense and the offender and the sentence imposed in comparable cases it is disproportionate, excessive and unwarranted;

9. Petitioner's death sentence was imposed in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment because he was sentenced to die following a trial at which he was denied, solely because of his poverty, a fair opportunity to prepare and present evidence as to why the death sentence should not be imposed. For the same reason the sentencing jury was deprived of evidence indispensable to the rational determination of penalty, and the death penalty imposed on the petitioner is accordingly a cruel and unusual punishment forbidden by the Eighth Amendment;

10. Petitioner's death sentence deprives him of life without due process of law in violation of the Fourteenth Amendment because it was imposed by procedures that were fundamentally unfair in that petitioner was not given adequate notice and an opportunity to present evidence and argument addressed to the specific issues that the sentencing authority considered determinative of the question of life or death;

11. The execution of the petitioner's death sentence will deprive him of life without due process of law, and will deprive him of the equal protection of the laws, in violation of the Fourteenth Amendment, because that sentence was reviewed and affirmed by the [Florida] Supreme Court pursuant to procedures that (A) were fundamentally unfair, in that the petitioner was denied notice and an opportunity to be heard regarding the "similar cases" that the [Florida] Supreme Court compared with his as the basis for its "proportionality review," and (B) denied the petitioner on the sole ground of his indigency, access to facts regarding "similar cases" which a death-sentenced defendant with adequate means could have presented to the [Florida] Supreme Court as the grounds for reducing his sentence from death to life imprisonment;

12. Petitioner's death sentence deprives him of life without due process of law in violation of the Fourteenth Amendment because it was imposed by procedures that were fundamentally unfair in that the petitioner was denied timely notice of, and a fair opportunity to prepare to meet, prejudicial evidence that was presented at his penalty trial.

13. Petitioner's death sentence deprives him of life without due process of law in violation of the Fourteenth Amendment because it was imposed by procedures that permitted a sentence of death to be rendered based upon facts that were not established beyond a reasonable doubt;

14. Petitioner's death sentence is a cruel and unusual punishment forbidden by the Eighth Amendment, and was imposed in

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violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment because it was based upon proceedings in which the prosecutor was permitted to urge a death sentence upon grounds that were couched in inflammatory argument of the prosecuting attorney and improper professional conduct;

15. Petitioner's death sentence was imposed and affirmed in violation of the Sixth and Fourteenth Amendments because he was denied the effective assistance of counsel at the penalty stage of his capital prosecution;

16. Petitioner's conviction and sentence of death deprive him of the equal protection of the laws and of his life without due process of law, in violation of the Fourteenth Amendment, because he was convicted and sentenced to die following a trial at which he was denied, solely because of his poverty, a fair opportunity to prepare and present his defense to the capital charge against him;

17. Petitioner's death sentence was imposed in violation of the Fifth, Sixth and Fourteenth Amendments, with the purpose and effect of penalizing the exercise of rights secured by those Amendments, in that it was imposed pursuant to a pattern and practice of the prosecuting and judicial authorities of the County of Polk, Tenth Judicial Circuit of State of Florida to reserve the sentence of death for capitally-charged defendants who refuse to plead guilty and thereby to waive their Fifth Amendment right to trial and their Sixth Amendment right to trial by jury;

18. Petitioner's conviction and death sentence were rendered in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment because he was indicted by a grand jury, and was convicted and sentenced to die by the recommendation of a petit jury, that were selected through procedures which systematically excluded racial minorities from jury service;

19. Petitioner's death sentence is a cruel and unusual punishment and deprives him of life without due process of law because it was imposed pursuant to the recommendation of a jury selected through procedures that systematically excluded from jury

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service persons having conscientious or religious scruples against capital punishment;

20. Petitioner's death sentence was imposed in violation of the Sixth Amendment because it was imposed pursuant to the recommendation of a jury from which persons having conscientious or religious scruples against capital punishment were systematically excluded, with the result that the jury did not constitute a representative cross section of the community;

21. The execution of the petitioner's death sentence would deprive him of life without due process of law, and of the equal protection of the laws, in violation of the Fourteenth Amendment, because the procedures used in the consideration and denial of his application to the Office of Executive Clemency for commutation of that sentence were fundamentally unfair, irregular and arbitrary;

22. The execution of the petitioner's death sentence would deprive him of the equal protection of the laws guaranteed by the Fourteenth Amendment, because the State of Florida was denied and denies the petitioner, solely on account of his poverty, opportunities for commutative relief against that sentence which are available to death-sentenced prisoners who have the financial means to afford them;

23. The execution of the petitioner's death sentence would deprive him of the equal protection of the laws guaranteed by the Fourteenth Amendment because he was legally incompetent and the State of Florida has denied him, solely on account of his poverty, opportunities available to death-sentenced prisoners who can afford them, to show that he was legally incompetent to be put to death;

Petitioner also filed a Supplemental Petition for Writ of Habeas Corpus, September 12, 1979, in which he added a claim of ineffective assistance of counsel. This brought the total number of the claims being alleged by petitioner to twenty-six. Respondent has raised no objection to the inclusion of these additional claims, and has also waived any claim that petitioner has

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failed to exhaust state court remedies as to any claim presented. Therefore, all twenty-six claims are now properly before this Court. However, as noted above, the claim relating to pre-trial identification has been withdrawn, leaving twenty-five claims for further consideration.

INFLAMMATORY ARGUMENT OF THE PROSECUTING ATTORNEY AND IMPROPER PROFESSIONAL CONDUCT.

> In many ways the prosecutor, by accident or by design, may improperly subvert the trial. The primary safeguard against abuses of this kind is the ethical responsibility of the prosecutor, who, as so often has been said, may 'strike hard blows' but not 'foul ones.' Berger v. United States, 295 U.S. 78, 88 (1935); Brady v. Maryland, 373 U.S. 83, 87-88 (1963). If that safeguard fails, review remains available under due process standards. United States v. Ash, 413 U.S. 300 (1973), 320.

Petitioner contends that remarks made by the assistant state attorneys during closing arguments were so prejudicial to his cause as to constitute a denial of his right to due process. The majority opinion in the Florida Supreme Court decision, although affirming petitioner's conviction and sentence, recognized that "...the prosecutor's remarks under ordinary circumstances would constitute a violation of the Code of Professional Responsibility...." Darden v. State, 329 So.2d 290 (Fla. 1976). Respondent's Supplemental Answer, at page 12, recites that "No one has ever even weakly-suggested that McDaniel's closing remarks were anything but improper...." (4)

The improper statements of the prosecution can be placed in four general categories:

(1) statements by the prosecution attempting to try petitioner for "offenses" of the State Division of Corrections;

(2) statements of the prosecution seeking to prejudice the jurors by improperly appealing to their emotions;

(3) statements of the prosecution which improperly placed the prosecutors' personal credibility in issue;

(4) other forms of improper argument.

THE OBJECTIONAL ARGUMENT

I

As examples of statements by the prosecution attempting to try petitioner for "offenses" of the State Division of

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Corrections, the record discloses the following excerpts from the prosecutor's jury argument:

> As far as I am concerned, there should be another Defendant in this courtroom... and that is the division of corrections, the prisons. (T. 749)
>
> * * *
>
> As far as I am concerned...this animal was on the public for one reason. Because the division of corrections turned him loose, lets him out, lets him out on the public. Can't we expect him to stay in a prison when they go there? Can't we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking? (T. 749)
>
> * * *
>
> I wish that person or persons responsible for him on the public was in the doorway instead of [the murder victim]. I pray that the person responsible for it would have been in that doorway and any other person responsible for it. I wish that he had been the one shot in the mouth. I wish that he had been the one shot in the neck, instead of [Phillip Arnold]. Yes, there is another Defendant, but I regret that I know of no charges to place upon him, except the public condemnation of them, condemn them. (T. 750-751)
>
> Mr Turman is dead because that unknown defendand we don't have in the courtroom allowed it. He is criminally negligent for allowing it. (T. 752)
>
> * * *
>
> There is one person on trial, not the Polk County Sheriff's Office, not the Hillsborough Sheriff's Office, but he and his keepers, the Division of Corrections. (T. 764)
>
> * * * *
>
> I cannot help but wish that the Division of Corrections was sitting in the chair with him [the defendant]. Thank you. (T. 782)

The prosecutor, Mr. McDaniel, engaged in a line of argument to draw the jury's attention to an issue wholly immaterial to the determination of petitioner's guilt or innocence, as exemplified by the following comments:

> That's the only way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it. It's the only way that anybody can be sure of it now, because the people that turned him loose--this man served his time and if this man served his time as the Court has sentenced him,

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> that's fine. If he's rehabilitated, fine. But let him go home on furloughs, weekend passes--not home, strike that, excuse me--go over with his girl friend for the weekend, go shoot pool for the weekend, go sell his guns, or gun, for the weekend, go consume drink in the bars over the weekend. (T. 733-734)

II

Statements of the prosecution seeking to prejudice the jurors by improperly appealing to their emotions include the following:

> I wish [Mr. Turman] had had a shotgun in his hand when he walked in the back door and blown his face off. I wish that I could see him [petitioner] sitting here with no face, blown away by a shotgun but he didn't....I wish someone had walked in the back door and blown his head off at that point. (T. 758-759)

Mr. McDaniel returned to this theme when he described the five times that the alleged murder weapon had been fired. He explained that this left one bullet in the chamber. "[Darden] didn't get a chance to use it. I wish he had used it on himself." (T. 774) He made a similar comment in describing Petitioner's automobile accident: "I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time." (T. 775) Finally, while discussing the claim that Petitioner had changed his appearance between the date of the crime and that of the trial, Mr. McDaniel gratuitously commented that "[t]he only thing he hasn't done that I know of is cut his throat." (T. 779) An additional comment in the same vein occurs at T.775, when the prosecutor stated "And Darden saved one [bullet]. Again I wish he had used it on himself."

III

The personal credibility of the prosecutors was placed in issue through comments such as these:

> I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life. (T. 748)

Mr. McDaniel, the lead counsel for the prosecution, repeatedly offered the jury his opinion that Petitioner was not a man worthy of belief. Since Petitioner's defense consisted

largely of his own alibi testimony, the prejudice from such remarks is manifest.

Petitioner testified that he had asked for the lie detector test. In discussing that testimony, Mr. McDaniel said: "I don't believe anything he says..." (T. 770) Petitioner testified that his alibi was the truth. Mr. McDaniel attacked this testimony in the following way: "Well, let me tell you something: If I am ever over in that chair over there, facing life or death, life imprisonment or death, I guarantee you I will lie until my teeth fall out;" (T. 755) and "The only person who took that stand, Mr. Maloney said no one took that stand and lied under oath. He was wrong. One did. Sitting over there with a yellow shirt on with the stripe down the front at this time." (T. 755-756) This was an obvious reference to Petitioner.

Petitioner testified that he remembered the precise times of several events that occurred during the day of the murder. These statements were a crucial part of his testimony for, if true, they established that he could not have been in the Turman furniture store at the time of the crime. Mr. Daniel's response: "I couldn't even tell you right now what day I put a witness on the stand this week." (T. 769) Petitioner testified that he stopped at a service station after his automobile accident, seeking assistance-- testimony that was confirmed by one of the state's own witnesses. Yet Mr. McDaniel discounted Darden's testimony and said: "That's what he says. I don't know that he stopped at any....I guarantee you he was not going back to the scene of the accident until he had gotten home." (T.777-778) In addition to telling the jury that he thought Petitioner a liar, Mr. McDaniel also suggested in a thinly veiled way that he knew of other instances where Petitioner had shot people: "Darden doesn't like people who move after he shoots them in the mouth." (T. 761)

IV

Other improper forms of argument were presented by the prosecution before the jury. Mr. McDaniel began his argument by telling the jury in effect that it should pay no attention to the argument of defense counsel that would follow because all defense lawyers always made the same arguments:

> Now [defense counsel] and I am positive, and I assure you and I guarantee you that [defense counsel] will try the Polk County Sheriff's Office; he will try the Polk County Sheriff's Office; and he will try me. And he will try Mr. White. I guarantee that, because has notes I gave him many years ago. (T. 749)

Mr. McDaniel discussed Petitioner's statement that he would take a lie detector test if his attorney were present. Mr. McDaniel told the jury:

> Well, only an incompetent lawyer would allow Darden to take a lie detector test. And that prisoner, with those convictions on his record, knows that. (T. 770)

Mr. McDaniel also made repeated references to aspects of Petitioner's conduct while on weekend furlough from prison that were entirely unrelated to the offenses with which he was charged. (T. 751,763,766)

Throughout the entire closing arguments of both prosecution attorneys, only two objections were ever raised by defense counsel. The first occurred when the prosecution suggested that Petitioner's girl friend, knowing that he was a criminal, allowed him to bring a gun into her house while he was on weekend furlough. (T 751). No specific ruling was made on the objection, but the comment was not stricken. The second objection raised by defense counsel was in response to the prosecution's comment that the only thing Petitioner had not done to alter his appearance was to cut his throat. (T.779) Defense counsel noted that it was the fifth time the prosecution had commented that he wished someone would have shot Petitioner, or that Petitioner would have killed himself. The court overruled the objection. (T. 780)

In Darden v. State, 329 So.2d 287 (Fla. 1976), the

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Supreme Court of Florida considered Petitioner's contention that remarks made by the assistant state attorneys during closing arguments were so prejudicial to his cause as to require the granting of a new trial. After a thorough examination and evaluation of the language being complained of by Petitioner, the Court concluded, however, that when the "totality of the record" was considered, the remarks of the Prosecutor amounted to harmless error.

STANDARD OF REVIEW

In a leading case on the question of whether a federal prosecutor's courtroom statements violated a defendant's right to due process or constituted prejudicial error depriving him of a fair trial. Berger v. United States, 295 US 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), the Supreme Court of the United States said:

> The United States-Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. Berger at 88.

The much later case of Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed. 2d 431 (1974), involved a federal habeas corpus proceeding brought by a state prisoner who alleged that the statements of the prosecutor during his state court trial violated the due process clause of the Fourteenth Amendment. The Supreme Court indicated that the scope of review in such a case would be the narrow one of due process "and not the broad exercise of supervisory power that it would possess in regard to its own trial court." Donnelly at 642. In determining that Petitioner had shown no prejudice amounting to a denial of constitutional due process, the Court took note that the

challenged statements constituted only a brief moment in the prosecutor's long argument, that there was neither the introduction of specific misleading evidence important to the prosecution's case in chief nor the nondisclosure of specific evidence valuable to the accused's defense and that the trial court, on the defendant's request, had instructed the jury to disregard the prosecutor's statement.

In addition, several other factors have been considered by the Supreme Court in evaluating whether a prosecutor's remarks made to, or in the presence of the jury, have constituted prejudicial error in depriving a defendant of due process, or his right to a fair trial. These considerations include the relative strength of the government's case against the defendant, whether the prosecutor's remarks were made in response to defense counsel's statements to the jury, whether defense counsel raised any objection to the complained of remarks, the prosecutor's intent and whether the prosecutor retracted the remarks.

BRIEF EPISODE OR PERSISTENT ERROR

In determining whether a prosecutor's statements in his argument to the jury constituted prejudicial error, the courts have taken note of whether the statements were but a brief episode in a long summation or whether the statements were repeatedly made. In United States v. Socony-Vacuum Oil Co., 310 US 150, 60 S.Ct. 811, 84 L.Ed. 1421 (1940), the Court found that although the statements of the prosecution were improper, they were "minor aberrations in a pro[illegible]aged trial and not cumulative evidence of a proceeding dominated by passion and prejudice." Socony-Vacuum at 240, and did not constitute prejudicial error.

Likewise, in Donnelly v. DeChristoforo, supra, the Court reasoned that the prosecutor's comment "was but one moment in an extended trial." Donnelly at 643, and did not violate the Defendant's right to due process. The same reasoning was followed by the Fifth Circuit Court of Appeals in Alvarez v. Estelle,

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511 F.2d 1319 (5th Cir. 1976), when it found that the single remark of the prosecution, when considered in the context of the entire trial, did not render the proceedings fundamentally unfair.

On the other hand, in circumstances where the prosecution's misconduct was pronounced and persistent, the courts have found that such comments had a probable cumulative effect on the jury, and thus resulted in prejudicial error. Berger v. United States, supra; Houston v. Estelle, 569 F. 2d 372 (5th Cir. 1978).

Two recent Fifth Circuit Court of Appeals cases, Cronnon v. Alabama, 587 F.2d 246 (5th Cir. 1979); and Cobb v. Wainwright, 609 F.2d 754 (5th Cir. 1980) merely mention the repeated comments of the prosecution in passing. Although factually distinct from each other, the court concluded in each case that the petitioner had not been denied due process.

II.

MISLEADING ARGUMENT OR FAIR SUMMARY

The courts have examined complained of prosecutorial statements to determine whether these statements amounted to the introduction of specific misleading evidence important to the prosecution's case in chief or the nondisclosure of specific evidence valuable to the accused's defense. In cases where the courts have found that neither of the above occurred, the courts have concluded that no denial of due process occurred. Donnelly, supra; Cobb, supra.

Conversely, when the courts found that the prosecutor had misstated facts, put words into the mouths of witnesses, cross-examined witnesses after deliberately misconstruing their testimony, assumed prejudicial facts not in evidence, Berger, supra, knowingly misled the jury and court about the significance of crucial evidence, Miller v. Pate, 386 US 1, 87 S.Ct. 785, 17 L.Ed. 2d 609 (1967), and implied that a defendant in a drug case was giving out names of drug traffickers to his attorney during the course of the trial, United States v. Corona, 551 F. 2d 1387 (5th Cir.1977),

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the courts found that the substantial rights of the defendant were prejudiced.

III

PERSONAL OPINION OR OPINION BASED ON EVIDENCE

In cases in which the prosecutor's remarks were found to have been made in response to the defense counsel's statements to the jury, it was determined that the prosecutor's statements to the jury did not violate the defendant's right to due process. In Socony-Vacuum, supra, the Supreme Court rejected the defendant's contentions that various statements of the prosecutor about his belief in the defendant's guilt and the government's desire for a conviction, constituted prejudicial error. The Court ruled that the statements were not prejudicial since the statements concerning the Government's wish to have the defendants convicted were made in response to defense counsel's repeated statements to the jury as to the knowledge and acquiescence by government officials in the defendants' conduct. Socony-Vacuum, at 241-242.

In Del Cristo v. United States, 327 F.2d 208 (5th Cir. 1964), the court found that the defendant was not denied a fair trial because the prosecutor in his summation to the jury said he believed the defendant to be guilty. The court determined that the argument of the defense that the prosecuting attorney did not believe that the defendant was guilty, but was merely doing his job, had provoked the retort from the prosecutor concerning his belief in the guilt of the defendant.

IV

PURPOSEFUL AND FLAGRANT OR FAIR COMMENT

In reviewing whether a prosecutor's courtroom remarks constituted prejudicial error, the courts have given consideration to whether the prosecutor's conduct was either purposeful or flagrant. Singer v. United States, 380 US 24, 85 S.Ct. 783, 13 L.Ed 2d 630 (1964). In Bruce v. Estelle, 483 F.2d 1031 (5th Cir. 1973), the court found that the prosecution's inaccurate suggestion that the defendant would be free to walk the streets if the jury found him unable to stand trial, was deliberate and

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calculated to influence the jury in its decision making. Bruce at 1040. Accordingly, the court concluded that the defendant's right to a fair hearing on the merits of the case had been infringed upon.

Similarly, in Kelly v. Stone, 514 F.2d 18 (9th Cir. 1975), the Court found that the prosecuting attorney's statement to the effect that perhaps the next time the victim wouldn't be "a little black girl from the other side of the tracks; maybe it will be somebody that you know," constituted a highly inflammatory and wholly impermissible appeal to racial prejudice. Likewise, the court found that:

> The district attorney's peroration that 'If you can't find the defendant guilty on the facts that I have presented to you, I feel like I just might as well, you know, close up shop and go home...' was not only a highly improper expression of personal opinion but constituted a veiled threat to the jury to return a guilty verdict. Kelly at 19.

The Court concluded that the cumulative effect to these improper comments and inflammatory statements made by the prosecuting attorney during argument to the jury operated to deny the black defendant a fair trial on rape charges.

V

WEAK CASE OR STRONG CASE

In determining whether improper remarks made by the prosecution constituted prejudicial or reversible error, one of the factors considered by the courts has been the relative strength of the case against the defendant. A review of relevant cases indicates that prejudice to the defendant was found when the case was a "weak" one as opposed to a "strong" one.

In Berger, supra, in reversing the defendant's conviction, the Court in evaluating the prosecuter's statements, noted that the case against the defendant was not strong, but might "properly be characterized as weak," and "in these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence." Berger at 89. On the other hand, in Socony-Vacuum, supra, the strength of

the government's case was one of the factors relied on by the Supreme Court in holding that the prosecutor's remarks, although improper, did not constitute prejudicial error. Socony-Vacuum at 299. The Court distinguished the decision in Berger, supra, in which the case against the defendant had been weak. Id.

In its opinion in Cronnon, supra, the Fifth Circuit Court of Appeals noted that although the language used by the prosecutor was strong, it was completely in accord with the evidence in the case. Cronnon at 251. Additionally, the concurring opinion took note of the fact that "the proof against the defendant was overwhelming." Id. at 252. And, in Cobb, supra, the Fifth Circuit found:

> Given the circumstances of this case, we conclude, and our conclusion is made easier by the strength of the evidence against Cobb, that no prejudice amounting to such a denial of constitutional due process was shown, Cobb at 756. (Emphasis added)

VI

OBJECTION MADE OR FAILURE TO OBJECT

A factor sometimes considered when the prejudicial or nonprejudicial effect of a prosecutor's comments is determined is whether an objection was made to the comments by defense counsel. In Berger, supra, Corona, supra, and Houston, supra, where the prosecution had made several comments which were objected to by the defense, the respective courts found that the defendants' rights had been prejudiced.

In Cronnon, supra, the court found that the Petitioner had not suffered a deprivation of due process. The concurring opinion points out that no objection was made to the prosecutor's closing argument. Cronnon at 252.

VII

Various courts have considered the effect of curative instructions sought by defense counsel as the result of improper comments of the prosecutor. In Socony-Vacuum, supra, and Donnelly, supra, it was held that under the particular facts obtaining (in each case the comment of the prosecutor was deemed to be but an isolated comment), the prosecutor's courtroom remark

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did not constitute a violation of the defendant's right to due process.

However, when the prosecutor has engaged in persistent and pronounced misconduct, the courts have indicated that instructions by the trial court directing the jury to disregard the prosecutor's improper remarks, were not sufficient to cure the error. Berger, supra; Houston, supra.

VIII

REMARKS WITHDRAWN, CURRATIVE INSTRUCTIONS

In Socony Vacuum, supra, where the defendant's conviction was upheld, one of the factors relied on by the Supreme Court in holding that the prosecutor's remarks to the jury did not cohstitute prejudicial error was that the prosecuter withdraw his remarks after the defendant had objected thereto. Socony-Vacuum at 242. And in United States v. Rodriguez, 585 F. 2d 1234 (5th Cir. 1978), the Fifth Circuit noted that the jury instructions given by the court may be considered as a factor in assessing the degree of prejudice sustained by a defendant because of improper comments by the prosecution. Rodriguez at 1244.

IX

The above enumerated specific factors have been considered by the Supreme Court and the Fifth Circuit Court of Appeals in evaluating whether a prosecutor's remarks made to, or in the presence of the jury, have constituted prejudicial error depriving a defendant of due process, or his right to a fair trial. The Supreme Court has given specific guidelines to be applied in arriving at a proper determination of the prejudicial effect on the jury, if any, resulting from trial errors.

The methodology for determining if the effect of trial errors on the trial jury was harmless or prevented defendant from receiving a fair and impartial trial is found in Kottekos v. United States, 328 US 750 (1945).

> In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of stare decisis by what

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has been done in similar situations. Cf. United States v. Socony-Vacuum Oil Co., supra, at 240-242. Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole, are material factors in judgment. Kotteakos, at 762.

* * *

Some aids to right judgment may be stated more safely in negative than in affirmative form. Thus, it is not the appellate court's function to determine guilt or innocence. Weiler v. United States, supra, at 611; Bollenbach v. United States, 326 US 607, 613-614. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. Appellate judges cannot escape such impressions. But they may not make them sole criteria for reversal or affirmance. Those judgments are exclusively for the jury, given always the necessary minimum evidence legally sufficient to sustain the conviction unaffected by the error. Weiler v. United States, supra, Bollenbach v. United States, supra.

But this does not mean that the appellate court can escape altogether taking account of the outcome. To weigh the error's effect against the entire setting of the record without relation to the verdict or judgment would be almost to work in a vacuum. Cf. United States v. Socony-Vacuum Oil Co., supra, at 239, 242. In criminal causes that outcome is conviction. This is different, or may be, from guilt in fact. It is guilt in law, established by the judgment of laymen. And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting. Cf. United States v. Socony-Vacuum Oil Co., supra, at 239, 242; Bollenbach v. United States, supra, 614.

This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record.

If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm, or a specific command of Congress. Bruno v. United States, supra, at 294. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand. Kotteakos, at 763-765. (Footnotes deleted, emphasis added)

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The Kotteakos "harmless error" test was cited in a Fifth Circuit opinion determining that prosecutorial misconduct denied defendant a fair trial in United States v. Haynes, 466 F.2d 1260 (5th Cir. 1972) and forms the basis for the "harmless error" constitutional rule announced in Chapman v. California, 386 U.S. 181 (1967). Chapman rejects any "overwhelming evidence" test.

SUMMARY

The Darden trial jury was subjected to numerous instances of prejudicial prosecutorial argument as above detailed. The case against Darden was not a weak case, but it did depend on the jury's determination of the credibility of Darden's alibi testimony as against the eye-witness testimony of the victims. All attacks upon Darden which would affect his credibility in the minds of the jurors or prejudice them against him would tend to discredit him and his testimony. Defense counsel's objection to the prosecutor's argument was late and tentative. The trial judge overruled the objection thereby making it appear that the argument could be properly considered by the jury.

The question which then must be asked is: In the context of the entire trial did the prosecutor's improper arguments either have a substantial influence on the jury's determination of guilt, or is there grave doubt about what influence the argument did have on the jury? Petitioner's trial counsel put in issue the credibility of the victims' identification by cross-examination and proper jury argument. Darden's testimony at trial included a denial of the offenses of an alibi, testimony which "appeared on its face to be sincerity." (Trial Judge's Findings of Fact For Sentence.)

In the context of the emotionally charged trial of Darden, a black man, accused of robbery, the brutal murder of a white man, the repeated shooting of a defenseless white teenager and vile sexual advances on a white woman, I have more than grave doubts that the improper, repeated, prejudicial argument of the prosecution did not affect the jury in its deliberation. I am convinced that the jury deliberation was substantially

influenced by the improper argument and that the jury was prejudiced against Darden by the argument. The State has failed to demonstrate,beyond a reasonable doubt, that the prosecutor's comments did not contribute to Darden's convictions, a burden mandated by Chapman v. California, supra. The argument was so egregious that the trial judge should have reprimanded the prosecutor and instructed the jury to disregard the improper remarks, even without objection of the defense counsel. The one effective objection was overruled and the judge thereby magnified the prejudice, leading the jury to believe that it was proper to consider the prosecutor's argument in determining the verdict. The horrible, heinous, repulsive nature of the crimes involved does not expiate the prejudicial effect of the prosecutors' argument in this case. To hold otherwise would eliminate any prosecutorial restraint and deny a defendant, in a case like the present one, a fair trial on a presumption that any prosecutorial misconduct, however egregious, is harmless where the crime is shocking and there would be sufficient evidence to convict if the misconduct had not occurred. The errors here were not harmless when viewed in light of the teachings of Kotteakos and Chapman, supra.

Although the Florida trial judge imposes the death penalty, and may do so notwithstanding a jury recommendation of life imprisonment, the jury recommendation is given great weight. In order to impose the death penalty following a recommendation of life, "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ...." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). See also: Burch v. State, 343 So. 2d 831, 834 (Fla. 1977). Darden was entitled to a fair trial on the issue of guilt and an equal measure of fairness at the sentencing phase, untainted by prejudicial argument of the prosecutor.

In making this recommendation, I am aware that the decision of the Florida Supreme Court in Darden v. State is due that deference required by Title 28 U.S.C. §2254 (d) as

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interpreted in Sumner v. Mata, ____ U.S. _____, 101 S.Ct. 764, 28 Cr.L. 3061, decided January 21, 1981. Section 2254 (d) relates to the factual determination made by the Florida court on appeal, which historical facts are not in dispute. Here and in that court the same record is reviewed. The ultimate determination of whether the prosecutor's prejudicial remarks denied petitioner a fair trial is a mixed question of fact and law. To the extent it is considered a factual determination, I conclude that the record, considered as a whole, does not fairly support a determination that Darden's trial was a fair trial. Considered as a determination of the appropriate legal resolution of the historical facts found, applying the federal constitutional standards herein set forth, I find that the Florida Supreme Court was in error in the fair trial standard it utilized and the results reached. That court summarized its standard for review as follows:

> "How is it possible to use language which is fair comment about these crimes without shocking the feelings of any normal person? The language used by the prosecutor would have possibly been reversible error if it had been used regarding a less heinous set of crimes." Darden v. State, 329 So. 2d 329, 290.

The answer, of course, is that even a person charged with the most heinous crimes is entitled to a fair trial, not a perfect trial but a fair trial.

> We are mindful of the fact that federal courts do not sit as courts of errors and appeals when a state prisoner seeks federal habeas corpus. At the same time, we cannot ignore our responsibility to insure that an accused obtains a fair trial by an impartial jury. As the Supreme Court has reiterated time and time again, "[e]xercise of calm and informed judgment by . . .[a jury's] members is essential to proper enforcement of law." Highly prejudiced remarks uttered by the prosecutor jeopardize the jury's deliberative process and hence infringe upon an accused's right to a fair hearing on the merits of the case. Bruce v. Estelle, 483 F.2d 1031, 1040 (5th Cir. 1973). (Footnotes deleted.)

The prosecutor struck foul blows, and there is grave doubt that the jury was not influenced by these foul blows. Accordingly, I find that Petitioner was denied his right to due process.

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MISCELLANEOUS DEATH PENALTY CLAIMS

Most of Petitioner's additional claims, asserted after the filing of the original petition in this cause, relate to the application of the death penalty statute, Florida Statutes §921.141. Except as otherwise specifically treated in this report and recommendation, the claims asserted lack sufficient merit to afford Petitioner habeas relief.

Petitioner's contentions that excessive punishment, cruel and unusual punishment, discrimination in punishment related to race, poverty, and fundamental unfairness mitigate against imposition of the death penalty are issues settled against Petitioner in Spinkellink v. Wainwright, 578 F. 2d 582 (5th Cir. 1978) and Proffitt v. Florida, 428 U.S. 242 (1976).

Arbitrary sexual, racial and poverty related patterns of sentencing are alleged by Petitioner, but no proof was offered to support these contentions. In an opinion striking down the Massachusetts death penalty statute, the Supreme Judicial Court of that state recites that "The criminal homicide data from the date of the post-Furman statutes through 1977 indicate... [that] (i)n Florida, of 286 blacks who had killed whites, forty-eight (16.8%) were sentenced to death; of 111 whites who killed blacks, none were sentenced to death." District Attorney v. Watson, Mass. Sup. Jud. Ct., 10/28/80, 28 Cr.L 2172. Petitioner, in the instant case, has failed to establish any such statistics showing a suspect pattern of sentencing. In any event, it is doubtful that such statistics, standing alone, would warrant habeas relief without a review of each case included in the statistical summary.

CLEMENCY PROCEEDINGS

Petitioner claims that he was denied due process in relation to the clemency proceedings. Whatever procedure Petitioner may suggest is unfair, irregular or arbitrary, there has been no showing of prejudice to Petitioner in the clemency proceedings. Nor is there any proof that Petitioner's poverty denied him an

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equal opportunity to establish that he was denied an opportunity for commutative relief or opportunity to establish that he was legally incompetent to be put to death."

I find no legal authority contrary to Justice England's concurring opinion in Sullivan v. Askew, 348 So.2d 312, 316-319 (Fla. 1977), wherein England stated:

> Nothing yet said by the United States Supreme Court suggests that the discretionary decision whether or not to allow a judicially approved death sentence is subject to the same due process strictures as are required for any judicial process employed to impose such a sentence. ...further ...I would not engraft these due process requirements on the clemency powers conferred in Florida's Constitution... Sullivan at 319.

DEATH PENALTY REVIEW

In Tedder v. State, 322 So.2d 908 (Fla. 1975), the Florida Supreme Court gave assurance that it would review all death penalty cases to assure an even-handed application of the death penalty and to insure that the death sentence would not be "wantonly" and "freakishly" imposed.. That assurance was accepted by the Supreme Court in Proffitt v. Florida, 428 U.S. 242 (1976), as satisfying the requirement that the Florida death penalty statute would be applied in a non-discriminatory fashion and not in an arbitrary or capricious manner.

The Florida Supreme Court performs this review function by comparing the facts and circumstances of each case with those of other cases in which the death penalty is imposed. Malloy v. State, 382 So. 2d 1190 (Fla. 1979) For a detailed discussion of the procedure followed by the Florida Supreme Court, see: Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Pursuant to the provisions of 28 USC, Supreme Court Rule 22, Petitioners have until mid-April, 1981 in which to file a petition for writ of certiorari to the Supreme Court of the United States. An example of the Florida Courts' difficulty in performance of this task is evident in the dissenting opinion in Malloy v. State, supra, at 1193. See also: Concurring Opinion in Godfrey v. Georgia, ___U.S.____, 100 S.Ct. 1759, 1980. Performance of the review function by the Florida Supreme

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Court was criticized by Justice Marshall in the dissenting opinion in Gardner v. Florida, 430 U.S. 349, 365 (1976), in which he stated that "the blatant disregard exhibited by the (Florida) courts below for the standards devised to regulate imposition of the death penalty calls into question the very basis for this Court's approval of that system in Proffitt." The majority, however, excused the Florida Court's review performance because Proffitt and Tedder were decided after the Florida Supreme Court Gardner decision. Gardner, supra, 361 n.12.

Petitioner claims that the review function performed by the Florida Supreme Court does not "assure that the death penalty will not be imposed in an arbitrary or capricious manner" as required in Proffitt, supra. In support of this claim, Petitioner, on November 15, 1979, filed an affidavit of the Clerk of the Florida Supreme Court, establishing that the Florida Supreme Court does not take into consideration sentencing factors in those capital trials which result in life imprisonment rather than the death penalty. A contention that such cases should be included in the review process was raised and rejected in Proffitt, supra, 259 n.16. Petitioner has submitted no proof other than this affidavit, and in light of the precedent of Proffitt, this claim must be denied.

THE WITHERSPOON PROBLEM

Petitioner alleges that the jury which convicted him and recommended the death penalty failed to include a true cross-section of the community because prospective jurors were improperly excluded based solely on their religious or conscientious scruples against the death penalty, in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968).

Five veniremen were excused for cause: Mr. Varney, Mr. Mays, Ms. Carn, Ms. Maher and Mr. Murphy. Each was excused for cause after expressing his opposition to the death penalty. It is now clear that exclusion of even one venireman on grounds at variance with the Witherspoon standard will void the death sentence even though the state may have one or more unexercised preemptory challenges. Burns v. Estelle, 592 F.2d 1297 (5th Cir.

1979); 626 F.2d 396, (5th Cir. 1980); Alderman v. Austin, 498 F.Supp. 1134 (S.D. Ga. 1980); Davis v. Georgia, 429 U.S. 122 (1976); Adams v. Texas, ____U.S. _____, 100 S.Ct. 1521 (1980). A general inquiry into personal, conscientious scruples against capital punishment cannot form a permissible basis for exclusion from a jury deliberating the life or death fate of another human being.

> It cannot be assumed that a juror who describes himself as having 'conscientous or religious scruples' against the infliction of the death penalty or against its infliction 'in a proper case' thereby affirms that he could never vote in favor of it or that he would not consider doing so in a case before him . . . Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed. Witherspoon v. Illinois, 391 U.S. 510, at 515 n.9 (citations omitted).

Such exclusions are constitutionally permissible only if veniremen make

> "unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Witherspoon v. Illinois, supra, 391 U.S. at 522-23 n.21 (emphasis in original), reiterated in Adams, 100 S.Ct. at 2525 and Burns, 626 F.2d at 398.

We need to go no further than to review the voir dire examination of Mr. Varney and Mr. Murphy to see that at least two prospective jurors were excused for holding views about capital punishment not shown to be sufficiently unbending to meet the standards of Witherspoon.

On the issue of prejudice against the death penalty the trial judge's cursory examination of Mr. Varney follows:

> THE COURT: All right, Mrs. Macy, do you hold such conscientious moral or religious principles in opposition to the death penalty you would be unwilling under any circumstances to recommend the death sentence? (Emphasis added)
>
> MRS. MACY: No, sir.
>
> THE COURT: Do you, Mr. Blankenship?

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MR. BLANKENSHIP: No, sir.

THE COURT: Mr. Pelellat?

MR. PELELLAT: No, sir.

THE COURT: Mrs. Spike.

MRS. SPIKE: No sir.

MR. VARNEY: Yes sir.

THE COURT: You feel then, sir, that even though and I am not saying it will it would be purely speculative, in the event that the evidence should be such that under the law that should be the legal recommendation you would be unwilling to return such a recommendation because of your conscientious beliefs?

MR. VARNEY: I believe I would. (Emphasis added)

THE COURT: All right, sir. You will be excused.

MR. MALONEY: I renew the objection. I do not think he should be challenged for cause.

THE COURT: Yes, sir, the objection will be noted and overruled.

All right, Mr. Varney, you will be excused. Thank you very much for your service. (T. 44-45)

Mr. Murphy's examination was nearly as abbreviated as Mr. Varney's. The equivocal question to Murphy evoked an equivocal answer. The following colloquoy ensued with juror Murphy:

CLERK: Theodore T. Murphy. Number 87.

(Mr. Murphy was seated in the jury box.)

THE COURT: Mr. Murphy, what is your occupation?

MR. MURPHY: Retired.

THE COURT: What did you do prior to retirement, sir?

MR. MURPHY: Several jobs. I was eight and a half years in the administration office in a seminary, before that I was thirty years with the utilities.

THE COURT: What seminary were you with, sir?

MR. MURPHY: St. Pius, Uniondale, New York.

THE COURT: Do you have any moral or religious,

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conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts? (Emphasis added.)

MR. MURPHY: Yes, I have.

THE COURT: All right, sir, you will be excused then.

(Mr. Murphy left the jury box.)

CLERK: Cecelia Clark Mulroy. Number 85.

THE COURT: Mrs. Horne, you will note the defendant object (sic) to him being excused for cause. (T.165)

The fact that Mr. Varney "believed" that he would "unwilling" or "unable" to recommend the death penalty because of his conscientious beliefs does not foreclose the possibility that despite his expressed convictions he could put his disbelief or unwillingness aside and do his duty as a citizen. His answer might have been that he could. Unfortunately, as in Davis v. Georgia, supra, the hard question was not asked. Likewise, Mr. Murphy's expression of moral, conscientious or religious principles which would be violated by recommending capital punishment does not foreclose the same possibility that he could put aside these principles and do his duty as a citizen. These responses failed to demonstrate "unambiguously," Witherspoon, 391 U.S. at 516 n.9, or "unmistakably," 391 U.S. at 522 n.21 that Varney and Murphy would have automatically voted against a recommendation of capital punishment, or that they would not make an impartial decision as to the guilt or innocence of Petitioner. The beliefs about capital punishment expressed by these two veniremen would not necessarily lead them to "ignore the law or violate their oaths." Adams v. Texas, supra. More was required than these tentative, initial, expressions of doubt as to their ability to recommend the death penalty in order to make it unmistakably clear that they would automatically vote against the imposition of capital punishment without regard to any

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evidence that might be developed. Their excusal was erroneous under Witherspoon, Burns and Adams, supra.

Respondent, in a one sentence argument, contends that Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978) and/or Proffitt v. Florida, 428 U.S. 242, included claims identical to Petitioner's Witherspoon claim and that the claim was rejected in those cases. (Respondent's Supplemental Memorandum of Law, page 4.) Spinkellink, supra at 592 cites voir dire examination of two excluded veniremen who both stated unambiguously that they could fairly judge Spinkellink's guilt but made it unmistakenly clear that they would automatically vote against the imposition of capital punishment without regard to the evidence. Although the reported decision in Spinkellink, supra, at page 592, recites that the transcript of the voir dire examination of the two excluded veniremen is "set forth in Appendix A," that appendix is not included in the published decision. I have reviewed that transcript. A reading of the Spinkellink jury voir dire examination reveals that two veniremen, excluded for cause, Mr. Ferrell and Mr. Colson, were clear and unambiguous in their determination not to impose the death penalty under any circumstances. Another venireman, Mr. Minatee, although initially expressing opposition to the death penalty was ultimately seated on the jury after further examination established that he could and would vote for capital punishment in a proper case. With that record before the Spinkellink court it was clearly no violation of Witherspoon to exclude the two veniremen for cause. In Proffitt, supra, the Supreme Court did not address any Witherspoon claim. Neither case cited by the Respondent represents authority for rejection of Petitioner's Witherspoon claim.

Witherspoon and the related cases discussed above establish a basis for vacating the death sentence but none of these decisions suggests that the conviction must also fall. To the contrary, the Witherspoon opinion, where half of the panel had been excused because of their opposition to capital punishment, expressly refuses to vacate the conviction. See also:

Burns, supra; Alderman, supra; and Brown v. Estelle, supra. In the instant case Petitioner has made no claim that the Witherspoon violation should result in vacation of the jury's verdict of guilt, but Witherspoon requires vacation of the death penalty.

ASSISTANCE OF COUNSEL

In further support of his application for habeas corpus relief, Petitioner WILLIE JASPER DARDEN alleges as one of his claims that the assistance of court appointed defense counsel was so ineffective as to deny him the due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States and to deny him his right to counsel as guaranteed by the Sixth Amendment of the Constitution of the United States. Petitioner has enumerated twenty-seven factual contentions as the basis for this claim.

A. REVIEW STANDARDS

There is a presumption that counsel has rendered legally effective assistance. Thomas v. Wyrick, 535 F.2d 413 (8th Cir.) cert. den. 97 S.Ct. 178, 429 US 868, 50 L.Ed. 2d 148 (1976). A habeas corpus petitioner challenging the effectiveness of the assistance of his counsel has the burden of establishing that the performance of his counsel fell below the acceptable standards. Id.

The Sixth Amendment of the Constitution of the United States provides: "In all criminal prosecutions, the accused shall enjoy the right, to have the Assistance of Counsel for his defence." In Powell v. Alabama, 53 S.Ct. 55, 287 US 45 (1932), with specific reference to capital cases, the Court indicated that this Constitutional guarantee contemplated "effective" counsel.

A leading Fifth Circuit case on what constitutes "effective" counsel is MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960). In that case, the court said:

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"We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna at 599.

[See also United States v. Gray, 565 F.2d 881, 887 (5th Cir. 1978); Lovett v. Florida, 627 F.2d 706 (5th Cir. 1980)].

In the recent case of Knight v. Florida, ____So.2d ____, Opinion of February 24, 1981, the Supreme Court of Florida adopted the following four principles as a standard to determine whether an attorney has provided reasonably effective assistance to his client:

"First, the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading.

Second, the defendant has the burden to show that this specific omission or overt act was a substantial and serious deficiency measurable below that of competent counsel...

Third, the defendant has the burden to show that this specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings...

Fourth, in the event a defendant does show a substantial deficiency and presents a prima facie showing of prejudice, the state still has an opportunity to rebut these assertions by showing beyond a reasonable doubt that there was no prejudice in fact..."

At the time the petition for habeas corpus relief was filed in the instant case, the Fifth Circuit Court of Appeals used two distinct criteria in evaluating the effectiveness of assistance rendered by retained as opposed to appointed counsel. [See: Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974); Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1974)]. The recent decision of the Supreme Court of the United States in Cuyler v. Sullivan, 100 S.Ct. 1708, 446 US 335, 64 L.Ed. 2d 333 (1980), mandates that courts shall not use two distinct criteria in evaluating the effectiveness of assistance rendered by retained as opposed to appointed counsel. The Supreme Court stopped short

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of articulating what standard should now be used in determining whether counsel had been effective.

In the recent case of Beavers v. Balkcom, 636 F.2d 114 (5th Cir. 1981), the Fifth Circuit Court of Appeals adopted the following guidelines in determining whether the requirement of effective assistance of counsel has been met.

> " 'This Circuit has been strict in its requirement of the effective assistance of counsel. Effective counsel does not mean 'errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.' This necessarily 'involves an inquiry into the actual performance of counsel in conducting the defense...based on the totality of the circumstances and the entire record.' Consequently, '[o]ne may receive ineffective assistance of counsel even though the proceedings have not been a farce or mockery.' " Beavers, supra, 115.

A review of defense counsel's pre-trial preparation and the handling of the trial itself indicates that notwithstanding Petitioner's claim to the contrary, defense counsels' assistance was not ineffective when measured by the test articulated in MacKenna v. Ellis, supra. Petitioner's claims concerning line-up, preliminary hearing, psychiatric examination, psychiatric evaluation, fingerprint evidence, continuance of November 1, 1973, dismissal of appointed counsel, change of venue, search and seizure, summoning of witnesses, sundry remarks of the court, motion to strike the jury panel, failure to object to the introduction of testimony, identification testimony, and miscellaneous other alleged failings of his defense counsel, even when viewed with the clear vision of hindsight, do not meet Petitioner's burden of proof necessary to establish ineffective assistance of counsel.

Based on the totality of the record and considering all of the evidence before this Court, it is clear that Petitioner's trial counsel made a substantial effort to afford Petitioner a defense to the charges upon which Petitioner was convicted. At both the pre-trial and trial stages, counsel for the Petitioner was effective in investigating and trying the case and in protecting the rights of the defendant in a professional, competent fashion. The representation, to the extent it was not

perfect, in no way prejudiced Petitioner.

In light of other recommendations in this report, the only allegations of ineffective counsel made by Petitioner which will be analyzed in depth are his contentions that (1) his defense counsel failed to fully develop Petitioner's alibi defense and failed to call defense witnesses in support of Petitioner's alibi claim, and (2) defense counsel was ineffective because he failed to object to repeated prejudicial comments made by the prosecution during closing arguments. The state court trial transcript and the evidentiary hearing held in this court reveal the following facts.

ALIBI DEFENSE

Defendant claimed that he was not at the crime scene. The trial testimony of Mrs. Helen Turman indicated that the assailant entered her store between 5:30 and 6:00 P.M. (T 233),[1] and spent a total of 10 to 15 minutes in the store. (T 266). She further indicated that she called the telephone operator to report the crimes while the assailant was still in pursuit of her neighbor Phillip Arnold. (T 242, 243)

Both Edith Lee Hill (T 291) and Phillip Arnold (T 467) testified that they thought that the shooting occurred about 6:00 P.M. John Daniel Stone testified that he was almost involved in an accident around 6:00 P.M. with a car some miles from the crime scene. It was established that Petitioner was the driver. (T 308)

Petitioner testified that right around 6:00 P.M., after the accident, he was driven to a gas station in Plant City, Florida, trying there to locate a wrecker to tow the automobile which had been involved in the accident. (T 640) Mary Simmons testified, however, that she drove Petitioner, leaving from the scene of the accident at about 6:30 or 6:40 P.M. (T 331), that they spent about 10 to 15 minutes at the gas station in Plant City, and that the trip from the accident scene to Tampa, Florida took one hour. (T 338, 340)

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At the evidentiary hearing in this court, Jack Johnson, Esquire, and Raymond Goodwill, Esquire, testified concerning their research and investigation of Petitioner's alibi claim. Mr. Johnson testified that the last time anyone saw Petitioner prior to the automobile accident was around 5:25 P.M. (H 235). The Public Defenders believe that the crime had been committed between 6:00 and 6:15 P.M. (H 235) and the accident occurred between 6:15 and 6:30 P.M. (H 213) The call concerning the homocide was received by the Lakeland Police Department at 6:31 P.M. (H 235); the accident was reported to the Hillsborough County Police Department at 6:32 P.M. (H 239-240). Mr. Johnson indicated that it was the opinion of the defense that there was not a good alibi defense on behalf of Petitioner because of the gap of time between when he was last seen prior to the accident, and the time when the crime occurred. (H 232) Attempts to locate anyone who could verify Petitioner's testimony concerning the repair of his car's muffler had been unsuccessful. (H 237)

Mr. Goodwill indicated that Petitioner did not provide the defense with any information which could account for his presence from 5:30 to 6:35 PM; (H-291) Mr. Goodwill further indicated that the evidence which was available to the defense did not preclude Petitioner from having been the assailant. (H 291)

Both Mr. Johnson, (H 239-240), and Mr. Goodwill, (H 349) were aware that the accident report was phoned in from a lounge just across the highway from the scene of the accident by an individual named "Glen." Mr. Goodwill and the Public Defender's staff did not go to the lounge in an effort to identify and locate "Glen" (H 349-350) to determine the exact time when he phoned the police after the accident had occurred. The Petitioner has offered no proof that "Glen's" testimony was essential to establish his alibi.

With regard to defense counsels' decision to call Petitioner as the sole defense witness, Mr. Johnson testified that this decision was a calculated trial tactic, planned for the

purpose of giving defense counsel the final closing argument before the jury. (H 236) Having already concluded that there was no real valid alibi defense which could be made on behalf of Petitioner (H 236), defense counsel believed that presenting a poor alibi was worse than no alibi at all. (H 236)

FAILURE TO OBJECT

Defense counsel for Mr. Goodwill testified that it was a conscious, deliberate decision on his part not to object to the repeated, objectionable comments made by the prosecution in closing arguments. (H 333-334) Defense counsel testified that the prosecution "would get much more vehement in his remarks if you allowed him to go on, and we could always come back in with an objection later on in order to preserve it for the appeal purpose." (H 334)

In Williams v. Beto, 354 F.2d 698 (5th Cir. 1965), the court recognized:

> ...the fact some other lawyer followed a different course in another case, or would have done differently had he been acting as counsel, is no ground for branding the appointed attorney with the opprobrium of ineffectiveness, or infidelity, or incompetency. The practice of law is an art as well as a science. As no two men can be exactly alike in the practice of the profession, it is basically unreasonable to judge an attorney by what another would have done, or says he would have done, in the better light of hindsight. Williams at 706.

The Fifth Circuit Court of Appeals has repeatedly recognized that the trial tactics and strategy of an attorney, even if judged to be in error in retrospect, do not constitute a denial of effective assistance of counsel. [Odom v. United States, 377 F.2d 853 (5th Cir. 1967); Daugherty v. Beto, 388 F.2d 810 (5th Cir. 1967); Lee v. Wainwright, 457 F. 2d 771 (5th Cir. 1972].

All of Petitioner's contentions regarding his ineffective counsel claims, including factors relavent to his alibi defense and the failure of the defense to object to the prosecution's closing argument, have been carefully considered. Evaluated in light of the cited cases, I find that Petitioner has failed to meet his burden of establishing ineffective assistance of counsel.

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CONCLUSION

Willie Jasper Darden has been denied a fair trial by jury in two ways. First, the Darden trial jury did not represent a fair cross section of the community by virtue of the exclusion of jurors inclined against the death penalty but not shown to be unqualified or unable to sit and recommend such penalty in a proper case. Secondly, the Darden jury was exhorted to convict and recommend the death penalty by emotional, irrelevant and prejudicial prosecutorial diatribes having no place in the dispassionate resolution of the question whether Darden was guilty and should receive the death penalty. Constitutional protections are not reserved for good people and denied to bad, nor does the right to a fair trial go by the board because the crimes charged are horrible to comprehend.

I recommend that habeas corpus relief be granted. If the prosecutorial argument claim is sustained Petitioner will be entitled to a new trial. If only the Witherspoon jury selection claim is sustained, Petitioner is entitled to vacation of the death sentence and imposition of a sentence of life imprisonment.

This 10th day of April, 1981, at Tampa, Florida.

PAUL GAME, JR.
UNITED STATES MAGISTRATE

PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-5590

WILLIE JASPER DARDEN,

Petitioner-Appellant,
Cross-Respondent,

versus

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections, State
of Florida,

Respondent-Appellee,
Cross-Petitioner.

Appeals from the United States District Court
for the Middle District of Florida

(July 23, 1985)

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges, and MORGAN, Senior Circuit Judge.*

PER CURIAM:

Willie Jasper Darden was convicted of murder and sentenced to death in Florida. After exhausting his direct and collateral appeals in state court, he sought federal habeas corpus relief. The district court denied his petition. A panel of this court, considering and rejecting three constitutional claims, affirmed that denial, with one judge dissenting. Darden v. Wainwright, 699 F.2d 1031 (11th Cir. 1983). Upon rehearing en banc, this court reversed, holding that the trial court's exclusion of one of the venirepersons from jury service was unconstitutional under Witherspoon v. Illinois, 391 U.S. 510 (1968). Darden v. Wainwright, 725 F.2d 1526 (11th Cir. 1984) (en banc).

On February 19, 1985, the Supreme Court vacated this court's en banc decision and remanded the case for further consideration in light of Wainwright v. Witt, 469 U.S. __, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). Having undertaken such a review under the standards announced in Witt, we conclude that Witt controls the juror exclusion issue in this case. Under the Witt standards, Darden is not entitled to habeas corpus relief. Accordingly, we

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* Circuit Judge Joseph W. Hatchett, having recused himself, did not participate in this decision. Senior Circuit Judge Lewis R. Morgan elected to participate in this decision pursuant to 28 U.S.C.A. § 46(c).

affirm the district court's denial of Darden's habeas corpus petition, and we reinstate the panel opinion, 699 F.2d 1031, as to all issues, except the juror exclusion issue.

The dissent maintains that the facts of Witt are distinguishable and concludes that the state trial judge's decision to exclude juror Murphy in this case violates the standards announced in Witt. The dissent would hold that the trial judge applied an erroneous legal standard. We disagree. In his question to juror Murphy, the trial judge asked: "Do you have any moral or . . . religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?" The legal standard articulated in Witt provides that a prospective juror may be excluded if the trial court is left with the definite impression that the juror's views would prevent or substantially impair the performance of the juror's duties in accordance with the instructions and oath. Although the dissenting judges in this case properly point out that a juror with strong conscientious objections to the death penalty might well be able to lay aside those objections and follow the law, it is nevertheless true that the difficulties such a juror would experience in doing so might well rise to the level of a "substantial impairment" of his performance as a juror. Thus, although the question posed to juror Murphy may not have been ideal, we cannot conclude that it was inconsistent with the "substantial impairment" test articulated in Witt. Moreover, as the dissent readily acknowledges, the trial judge did

articulate an unquestionably correct legal standard on many other occasions during the voir dire. Thus, we must conclude, as did the Supreme Court in Witt, 469 U.S. at __, 83 L.Ed.2d at 856-57, that the state trial judge applied the correct legal standard.

Having concluded that the trial judge employed the correct legal standard, the voir dire record with respect to juror Murphy provides fair support for the trial judge's decision to exclude Murphy. In Witt, the Supreme Court held that there was fair support in the record to support the trial judge's decision to exclude juror Colby. The voir dire record with respect to Colby established merely that Colby thought that her personal beliefs would interfere with her sitting as a juror.

In this case, the voir dire record with respect to juror Murphy establishes that juror Murphy had moral or religious principles in opposition to the death penalty so strong that he would be unable to vote for the death penalty regardless of the facts without violating his principles. The dissent correctly points out that the record does not establish whether or not Murphy would have been able to lay aside his principles and follow the law. However, the voir dire record with respect to juror Colby in Witt contained the same flaw, i.e., the record was silent as to whether juror Colby could have laid aside her personal beliefs and followed the law. The record established merely that juror Colby's beliefs would interfere with her sitting as a juror. The Supreme Court in Witt held that that provided a sufficient factual basis for the trial judge's decision to exclude juror Colby. We cannot conclude that there

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is less factual support in this case. In other words, principles so strong that a juror would be unable without violating his principles to vote for the death penalty is at least as strong a factual basis for an exclusion decision as principles that would interfere with one's sitting as a juror.

The Supreme Court in Witt also relied upon two additional factors, the trial judge's opportunity to observe the juror's demeanor, and the lack of objection by defense counsel. Noting that defense counsel did not object to the exclusion of juror Colby, the Supreme Court suggested that no one in the courtroom questioned the fact that juror Colby's beliefs prevented her from sitting, and that, although not disclosed clearly on the record, it may have been readily apparent to those in the courtroom that she was properly disqualified. Similarly, in this case, the trial judge had the same opportunity to observe juror Murphy's demeanor, and Darden's trial counsel did not object to the exclusion of juror Murphy.

Thus, we conclude that Wainwright v. Witt compels the holding in this case that the voir dire record with respect to juror Murphy does constitute fair support for the trial judge's decision to exclude the juror.

AFFIRMED.

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TJOFLAT, Circuit Judge, specially concurring:

I agree with the court's decision to affirm the district court's denial of habeas corpus relief, though for different reasons. As I wrote in dissenting to our previous en banc disposition, Darden v. Wainwright, 725 F.2d 1526, 1533 (1984), the district court should have dismissed the habeas petition in this case because it contained several unexhausted claims. Rose v. Lundy, 455 U.S. 509, 518-22, 102 S.Ct. 1198, 1203-05 (1982); Galtieri v. Wainwright, 582 F.2d 348, 354 (5th Cir. 1978) (en banc). As for the merits of petitioner's Witherspoon claim, assuming it to be properly before the court, I would reject the claim for want of a showing by petitioner of "cause" and "prejudice" under Wainwright v. Sykes, 433 U.S. 72, 90-91, 97 S.Ct. 2497, 2508-09 (1977), since petitioner denied the Florida Supreme Court an opportunity to pass on it in reviewing his conviction and death sentence on appeal. Darden v. Wainwright, 725 F.2d at 1544-51 (Tjoflat, J., dissenting). Were I to consider four square the precise Witherspoon claim petitioner now presents to us, I would agree with the court that Wainwright v. Witt, ___ U.S. ___, 105 S.Ct. 844 (1985), requires us to hold that the state trial judge did not violate the Constitution in excusing venireman Murphy for cause.

HILL, Circuit Judge, specially concurring:

I concur in the majority opinion.

My brother Clark finds my pre-Witt[1] observations to have been well taken. As a statement of what I perceived the law to have been when I wrote those passages, I do not unsay a word. I am, now, however, further instructed.

Witt is a major correction addressed to those of us who have accepted footnote 21 of Witherspoon[2] as command. Having consisted of dicta, then, it is held to be, now. Witt, 105 S. Ct. at 851. While we have lost our touchstone, to which I repaired, we are re-directed to the traditional test. Is the juror fair and impartial? See Witherspoon, 391 U. S. at 532-40 (Black, J., dissenting).

The remnant of Witherspoon seems to be this. A juror is no more disqualified because he or she is opposed to the death penalty than is one in favor of it. All are qualified, on this issue, who can apply the law -- including mitigation, aggravation, and other elements of capital punishment -- without bias in the case to be tried. "To hold that Witherspoon requires anything more would be to hold, in the name of the Sixth Amendment right to an impartial jury, that a State must allow a

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1 Wainwright v. Witt, 105. S. Ct. 844 (1985).

2 Witherspoon v. Illinois, 391 U. S. 510, 522-23 (1968).

veniceman to sit despite the fact that he will be unable to view the case impartially." Witt, 105 S. Ct. at 851.

Whether released from or cast adrift from the criterion of footnote 21, I have no difficulty in concluding, as did the trial judge, that accepting venireman Murphy would have qualified one as a juror who was not impartial. Id. at 853-55.

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JOHNSON, Circuit Judge, dissenting:

The court holds that under the standards announced in Wainwright v. Witt, 105 S.Ct., 844 (1985) Willie Jasper Darden is not entitled to habeas corpus relief. Because Witt maintains constitutional limitations on the power of the State to exclude jurors opposed to capital punishment, limits that have been transgressed in this case, I respectfully dissent.

I. THE EXCLUSION

Willie Jasper Darden's trial for murder, robbery and attempted murder began in Florida state court on January 15, 1974, at 9:00 a.m. After all prospective jurors had been placed under oath, the trial court heard a motion in chambers. Darden's attorney moved to limit the voir dire examination of the State Attorney in order to foreclose any questioning regarding the venirepersons' views about capital punishment. In the course of denying this motion, the trial judge explained the conditions which would lead him to disqualify a juror for cause:

> It is my ruling if a prospective juror states on his voir dire examination that because of his moral, religious or conscientious principles and belief he would be unwilling to recommend a death penalty, even though the facts and circumstances meet the requirements of law, then he in effect has said he would be unwilling to follow the law the court shall charge upon it and disregard and be unwilling to follow it or if he did follow it, it would be going against his principles, and, therefore, I would rule that would be disqualification. If that exists, I intend to disqualify for cause. (Emphasis sup-

plied

The court convened after the hearing in chambers and the prospective jurors were brought into the courtroom. After a reading of the indictment and a general explanation of capital sentencing procedures in Florida and the presumption of innocence, the court told the prospective jurors that twelve venirepersons would be called to sit in the jury box, at which time the court would "inquire of you [twelve] concerning your qualifications to serve on this particular case."

Twelve jurors were seated in the jury box. After some preliminary questions regarding the twelve jurors' knowledge of the case and their occupations, the court made the following statement:

> Now I am going to ask each of you individually the same question so listen to me carefully, I want to know if any of you have such strong religious, moral or conscientious principles in opposition to the death penalty that you would be unwilling to vote to return an advisory sentence recommending the death sentence even though the facts presented to you should be such as under the law would require that recommendation?

The court proceeded to ask each of the twelve venirepersons a question similar to the one just described and excused two prospective jurors on the basis of their responses. Two more prospective jurors were seated and asked similar questions. The attorneys then questioned the twelve venirepersons as a group and individually before exercising several peremptory challenges. The process continued through the morning and resumed after lunch recess.[1]

At one point in the afternoon, venireperson Theodore

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Murphy was seated. After inquiring Mr. Murphy's occupation, the court asked him the following question: "Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?" (emphasis supplied). Murphy replied "Yes" and was immediately excused.

The State Attorney and Darden's attorney ultimately accepted a panel of twelve jurors. During the selection of alternates, the court asked venireperson Adkins a question similar to the one asked of Murphy: "Do you hold such strong principles in opposition of the death penalty that you would be unable without violating them to recommend them, [sic] recommend a death penalty to the Court?" Adkins replied that he held no such principles and later was accepted as an alternate.

II. THE WAINWRIGHT V. WITT DECISION

The Constitution gives criminal defendants the right to an impartial jury. Consequently, it limits the power of the State to exclude persons from a jury in the trial of a capital crime; the State may not exclude prospective jurors simply because they oppose capital punishment. This limitation prevents the selection of a jury "uncommonly willing to condemn a man to die." Witherspoon v. Illinois, 391 U.S. 510, 521 (1968). Supreme Court and lower court precedent has until recently enforced this limitation through the use of a stringent standard of proof: jurors could not be excluded based on beliefs about capital

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punishment unless they made it "unmistakably clear that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968). See also Maxwell v. Bishop, 398 U.S. 262, 265 (1970); Boulden v. Holman, 394 U.S. 478, 482 (1969); Darden v. Wainwright, 725 F.2d 1526 (11th Cir. 1984)(en banc), vacated 105 S.Ct. 1158 (1985).

The Supreme Court's opinion in Wainwright v. Witt, 105 S.Ct. 844 (1985), does not denigrate the importance of an impartial jury. It maintains the limitations on the power of the State to exclude jurors opposed to capital punishment. The primary responsibility of a trial court, whether under Witherspoon or Witt, is to distinguish between "prospective jurors whose opposition to capital punishment will not allow them to apply the law or view the facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial." Id. at 850-51.

Witt does, however, modify and "clarify" the method a trial court should use in making this difficult determination of juror impartiality. Excludable jurors no longer have to indicate an "automatic" refusal to vote for the death penalty, nor must they indicate bias with "unmistakable clarity." The "simplified" standard requires that a prospective juror leave the trial court

with the definite impression that his or her views would "prevent or substantially impair the performance" of [illegible] in accordance with the instructions and oath. Id. at 850-51.

The Witt decision also affects the relevant appellate standard of review. The trial court's finding of juror bias is now subject to the "presumption of correctness" contained in 28 U.S.C.A. § 2254(d)(West 1977), because the predominant function of a trial court in determining juror bias "involves credibility findings whose basis cannot be easily discerned from an appellate record." Id. at 855. See Patton v. Yount, 104 S.Ct. 2885 (1984). Nevertheless, an appellate court must still review a finding of juror bias based on capital punishment beliefs in order to determine whether an exception to Section 2254(d) applies.[2] There are two exceptions relevant to this case.

III. FINDING NOT FAIRLY SUPPORTED BY THE RECORD

The state trial court in this case found that venireperson Murphy could not properly carry out his duties as a juror and excused him for cause. This factual determination, made after a hearing on the merits and evidenced by the written transcript of the voir dire proceedings, see Witt, 105 S.Ct. at 855-56, deserves a presumption of correctness unless Darden shows the applicability of one of the enumerated reasons for avoiding the presumption.

The presumption of correctness described in Section 2254(d) does not apply where an appellate court considering the record as a whole concludes that the record does not fairly

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support the factual determination of the state court. 28 U.S.C.A. § 2254(d) (West 1977). The Witt decision indicates one possible basis for invoking that exception in this case: a petitioner may show that the record does not fairly support a factual finding of bias based on capital punishment beliefs by demonstrating that the trial court did not apply the correct legal standard in determining whether to exclude venirepersons.

The petitioner in Witt contended that the record did not fairly support the trial court's finding of juror bias because the excluded juror, Colby, was the first one questioned and the record did not reveal whether the trial court applied the proper legal standard in excluding Colby. The Supreme Court rejected this argument because "where the record does not indicate the standard applied by a state trial judge, he is presumed to have applied the correct one" and because in Witt's case there was "every indication that the judge applied the correct standard." Witt, 105 S.Ct. at 856. Although the judge did not reveal the standard used to evaluate Colby's responses, on subsequent occasions during voir dire he asked jurors questions "entirely consistent" with the proper legal standard. There was no indication that the judge used different standards during the course of voir dire.

The Supreme Court implied throughout this discussion that if the record indicates the trial court evaluated a venireperson's qualifications under a legal standard inconsistent with the one set forth in Witt and Adams v. Texas, 448 U.S. 38 (1980), a finding of disqualifying bias would not be fairly

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supported by the record. Indeed, no other conclusion is possible. A factual finding made under the wrong legal standard lacks support because, even if a trial court correctly observes a juror's demeanor or correctly interprets the contextual meaning of different questions and answers, the court must ultimately evaluate these facts under a legal standard before making the final determination of juror disqualification. Even a judge with the best possible understanding of a juror's beliefs cannot reliably decide whether that juror is disqualified to serve if the judge does not understand the type of beliefs that could lead to disqualification. The choice of a legal standard governing jury impartiality is a separate question from whether any given juror meets the standard. Patton v. Yount, 81 L.Ed.2d 847, 858-59 n.12 (1984). An erroneous answer to the first question inevitably undermines the resolution of the second one. Cf. Bose Corp. v. Consumers Union, Inc., 104 S.Ct. 1949 (1984)(clearly erroneous standard inapplicable where lower court predicated its findings of fact on misunderstanding of governing rule of law).

The trial court in this case used an improper legal standard to determine whether Murphy and other venirepersons held beliefs about capital punishment that disqualified them to serve as jurors. The judge stated on the record that he intended to disqualify any prospective juror who showed that "he would be unwilling to follow the law [as instructed by the court] or if he did follow it, it would be going against his principles ..." (emphasis supplied). The standard applied by the trial judge in this case contains two possible grounds for disqualification:

(1) an outright unwillingness to follow the law or (2) a willingness to follow the law reached only after deciding to violate personal principles. This two-fold standard of disqualification operated throughout the voir dire. The court questioned some veniremembers regarding the first ground and others, such as Murphy and Adkins, regarding the second ground.

The two-fold standard unavoidably conflicts with the proper standard described in Witt. A juror may be excluded for his or her views on capital punishment only when the trial court has the definite impression that the juror's beliefs would prevent or substantially impair the performance of duties in accordance with the instructions and oath. A belief does not "substantially impair" the performance of duty simply because it leads the person to oppose capital punishment: Witt states that trial courts have to distinguish among all those jurors who oppose the death penalty and may exclude only those opponents who cannot perform their duties in spite of their philosophical beliefs. 105 S.Ct. at 850-51. The Witt standard maintains an "essential balance" between

> the right to a jury panel drawn from a "fair cross-section of the community"--which if carried to its logical conclusion would require that a juror be seated who frankly avowed that he could not and would not follow the judge's instructions on the law--[and] the traditional right of a party to challenge a juror for bias--which if carried to its logical extreme would permit exclusion from jury panels of groups of people whose general philosophical views might have no bearing on their ability to follow a judge's instructions.

Witt, 105 S.Ct. at 852 n.5. This balance was maintained in Witt

because the questions asked by the prosecutor and the answer given by venireperson Colby led the trial court to the reasonable conclusion that Colby's views about capital punishment would "interfere" with her ability to judge impartially the guilt or innocence of the defendant. The context of the questions and answers supported the trial court's conclusion that the term "interfere" was similar in meaning to "prevent or substantially impair." Colby was properly excluded because she had beliefs in opposition to capital punishment and because she positively indicated that those beliefs would prevent or substantially impair the performance of her duties as a juror.[3]

Philosophical views about capital punishment, standing alone, will not substantially impair a juror's performance of duty. The Witt opinion compels this conclusion, for if philosophical beliefs alone were treated as a substantial impairment of duty it would destroy the balance established in that case. According to Witherspoon and Witt, the Constitution prohibits a court from presuming that personal views regarding capital punishment will prevent a juror from conscientiously following the law, for some persons strongly opposed to capital punishment may nevertheless be able to follow the law when serving as jurors. Hence, personal views opposed to capital punishment must be accompanied by the additional belief that personal views in conflict with the law could or would not be put aside by a juror.[4]

The second ground for disqualification relied upon by the trial court in Darden's case excluded prospective jurors who

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expressed views about capital punishment but not about the circumstances under which they might ignore those personal beliefs. The court therefore used an incorrect legal standard to exclude venireperson Murphy. Its finding that Murphy was not legally qualified to serve on the jury is not fairly supported by the record as a whole. Hence, the presumption of correctness does not apply to this finding and Darden has proven that the exclusion of Murphy was incorrect, entitling him to habeas corpus relief.

IV. INADEQUATE DEVELOPMENT OF MATERIAL FACTS

The presumption of correctness also does not apply where the petitioner establishes "that the material facts were not adequately developed at the State court hearing." 28 U.S.C.A. § 2254(d)(3)(West 1977). Even if the trial court in Darden's case had been applying the proper legal standard to evaluate Murphy's qualifications, the presumption of correctness would still not apply because the court did not elicit sufficient information from Murphy upon which to base its finding of bias. Murphy's responses failed to give the court any evidence regarding at least one "material fact," namely, the relationship between his personal views and his ability to perform jury duty.

Murphy's ability to put aside personal beliefs regarding capital punishment was a material fact, crucial to the adequate consideration of Darden's constitutional claim. See Townsend v. Sain, 372 U.S. 293 (1963). As discussed in section III above, the trial court could not determine Murphy's qualifications

without finding out whether and to what extent he could override his personal beliefs about capital punishment when they conflicted with his duties as a juror.

The trial court never elicited this crucial information from Murphy, for the question asked of Murphy never touched on this fact. It asked only whetner Murphy held principles in opposition to the death penalty "so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts." This question asks whether the conflict between personal principle and jury duty holds true for every conceivable fact situation; in other words, it deals with the scope of the conflict without addressing Murphy's ability to resolve the conflict.

The court did ask other prospective jurors whether they could ignore their personal beliefs during the performance of their duties as jurors. In all likelihood, Murphy heard the court ask the others about this matter. Yet it would be unreasonable to conclude from this fact, as the State does, that when Murphy answered "yes" to a question about the content of his beliefs, he also meant to state that he was unable to override those beliefs. The court had addressed the earlier questions to persons seated in the jury box and not to the other prospective jurors in the courtroom. Murphy had reason to think that the court might ask him about his ability to subordinate personal belief to duty as a juror and he may even have considered what answer he would give. But the first question to Murphy asked only if he would have to violate personal principles in order to

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recommend a death sentence. He never had a chance to answer the second question as he might have expected. Because the court dismissed Murphy before asking about this matter, it failed to develop adequately a material fact.

The voir dire proceedings never revealed whether Murphy could override his personal views about the death penalty. This failure makes the presumption of correctness inapplicable to the trial court's finding of disqualification.[5] Moreover, by showing the lack of any evidence regarding Murphy's ability to override his personal beliefs, Darden has proven that the trial court was erroneous in its decision to exclude Murphy. He is entitled to habeas corpus relief.

V. CONCLUSION

The Sixth Amendment right to an impartial jury drawn from a fair cross-section of the community gives the defendant an "inestimable safeguard" against the "corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." Duncan v. Louisiana, 391 U.S. 145, 156 (1968). A fair cross-section of the community includes those "jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial." Wainwright v. Witt, 105 S.Ct. 844, 850-51 (1985). Wainwright v. Witt did not overrule the core meaning of Witherspoon v. Illinois and does not require this court to avert its attention when a petitioner claims that a state court violated his right to an impartial jury. Because the trial court in this case excluded

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a venireperson without determining that his views about capital punishment prevented or substantially impaired the performance of his duties as a juror, the district court improperly refused to grant habeas corpus relief. Accordingly, I dissent.

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[illegible] the early afternoon, veniremperson Mayo was asked, "Do you have any religious, moral, or conscientious principles against the death penalty or anything that they would make her unwilling to recommend the death penalty regardless of the evidence. Several moments later, the court asked, "Have I asked if you have any conscientious beliefs against the death penalty?" She replied positively and after several more questions from the attorneys, veniremperson Staha was seated. The court asked Staha the following question: "Do you have any opinions or principles in opposition to the death penalty that are so strong that it would make it impossible or very difficult for you to vote to recommend a verdict of a death sentence regardless of what the facts might be?" Veniremperson Murphy was seated immediately after Staha.

[2]Appellate review may also serve other functions in cases of this sort, such as a determination of the precise factual finding made by the state court or an inquiry as to whether the presumption of correctness has been overcome by convincing evidence.

[3]The majority's confusion of these two types of beliefs leads it mistakenly to equate the positions of Colby and Murphy: "principles so strong that a juror would be unable without violating his principles to vote for the death penalty is at least as strong a factual basis for an exclusion decision as principles that would interfere with one's sitting as a juror." The flaw in this reasoning is plain. Colby stated that a conflict between belief and duty would interfere with performance of duty, while Murphy said only that a conflict would exist. The fact that a conflict exists between belief and duty tells a judge absolutely nothing about how the juror will react when faced with that conflict.

[4]There are reasons to think that this second type of conviction must be quite strong before it could disqualify a prospective juror. First, under Witherspoon, a veniremperson had to display an absolute unwillingness to ignore personal views in conflict with a juror's duty. Since the Witt court stated that it was adhering to the same essential balance of interests struck by the Witherspoon decision, 105 S.Ct. at 852 n.6, a very strong unwillingness to ignore personal views should be necessary. Second, the term "substantially" in the phrase "prevent or substantially impair" connotes some impairment of ability to perform duty approaching a complete impairment.

[5]This failure to develop the facts necessary to establish Murphy's inability to serve as an impartial juror could fall within the exception of Section 2254(d)(3), a failure to develop the material facts, or the exception of Section 2254(d)(8), a lack of fair support in the record.

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CLARK, Circuit Judge, dissenting:

I concur with Judge Johnson's dissent. I find compelling the following statement by Judge Hill in his special concurrence to our en banc court's reversal of the district court's denial of the writ of habeas corpus. 725 F.2d 1526 (11th Cir. 1984) (en banc):

> A conscientious trial judge must be bent upon determining if a prospective juror has such a mind set that he or she would refuse to vote for the death penalty regardless of the evidence in the case. That is fact-finding. "The state of a man's mind is as much a fact as the state of his digestion." Eddington v. Fitzmaurice, 29 Ch. 459, 483 (1885) (Bowen, L.J.).
>
> Yet the record must contain sufficient evidence to justify a finding of fact that a venireperson was of such a mind set that he or she was, under the law, disqualified, or the finding cannot be said to be supported. In Mr. Murphy's case, there was not sufficient evidence. He was clearly shown to be a person who could not vote in favor of capital punishment without violating his principles. He was not asked (so he never said) whether or not, if the evidence were sufficiently strong and the circumstances sufficiently aggravating, he could nevertheless vote to recommend the death penalty.
>
> Judge Fay recounts for us the painstaking and conscientious efforts of Judge Dewell to adhere to the teachings of Witherspoon in the voir dire proceedings. It seems clear that Mr. Murphy heard and, no doubt, understood what had been asked of those who had been examined before him. One must assume that he fully expected to be asked, after he had acknowledged his principled opposition to the death penalty, whether or not he could nevertheless vote in favor of it if the evidence in the case indicated it to be appropriate under the law. For aught appearing, he may have felt compelled under his oath to say that he could. Until it appeared that he could not, he was not disqualified. Applying the teachings of Davis v.

> Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the writ must issue, conditioned upon resentencing.

725 F.2d at 1541 (footnote omitted).

The Supreme Court made crystal clear in Wainwright v. Witt, 496 U.S. ___, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) that it reaffirmed the standard it had set in Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980) when it said:

> That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."

105 S.Ct. at 852 (quoting from Adams) (footnote omitted).

It is clear that juror Murphy was never given an opportunity to state whether his views would prevent or impair the performance of his duties.

I also dissent on the issues of prosecutorial misconduct and ineffective assistance of counsel as I did initially as a member of the three judge panel, 699 F.2d 1031 (11th Cir. 1983) at pages 1040-1043.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 27
SPENCER D. MERCER
CLERK

NO. 81-5590

WILLIE JASPER DARDEN,

Petitioner-Appellant,
Cross-Respondent,

versus

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections, State
of Florida,

Respondent-Appellee,
Cross-Petitioner.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION FOR REHEARING DIRECTED TO THE EN BANC COURT

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges, and MORGAN, Senior Circuit Judge.*

PER CURIAM:

At the request of one of the members of the en banc court, the court has been polled on the petition for rehearing

* Circuit Judge Joseph W. Hatchett, having recused himself, did not participate in this decision. Senior Circuit Judge Lewis R. Morgan elected to participate in this decision pursuant to 28 U.S.C.A. § 46(c).

addressed to the en banc court. Less than a majority of the en banc court, and less than a majority of the judges in regular active service, have voted in favor of the petition. The petition for rehearing is, therefore, DENIED.

At 9:00 a.m. Tuesday, September 3, 1985, the mandate will issue and the stay of execution heretofore and presently in effect shall terminate.

CLARK, Circuit Judge, dissenting:

I dissent from the denial of petitioner's motion for rehearing en banc in this case. Using either the Caldwell v. Mississippi, ___ U.S. ___, 105 S.Ct. 2633 (1985), or the Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) (en banc), standard,[1] Darden is entitled to habeas corpus relief due to the prosecutor's closing argument at the guilt/innocence phase of his trial.[2]

No one, not even the State, as the district court noted, has ever asserted the arguments given by the prosecutors in this case were anything but improper. Darden v. Wainwright, 513 F.Supp. 947 (M.D. Fla. 1981). The magistrate in this case concluded: "I am convinced . . .

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[1]As I noted in my dissent from the denial of rehearing in Brooks, the majority's use of the Strickland v. Washington prejudice standard cannot be reconciled with the Supreme Court's utilization of the "no effect" test in Caldwell. Brooks v. Kemp, No. 83-8028 (July 23, 1985) (Clark, J. dissenting). Rehearing should be granted to clarify the discrepancy between the language of the en banc court in Brooks and that of the Supreme Court in Caldwell. Using either, however, Darden is entitled to relief.

[2]A review of the record clearly indicates that the prosecution made its sentencing argument at the guilt/innocence phase. Early in Mr. McDaniel's argument he stated:

> I will guarantee you I will ask for death [at the penalty phase]. There is no question about it. The second part of the trial I will request that you impose the death penalty. I will ask you to advise the court to give him death. That's the only way I know that he is not going to get out in the public. It's the only way I know. It's the only way I can be sure of it.

that the jury was prejudiced against Darden by the argument." Under the new Brooks test, prejudice is the key element that a petitioner must demonstrate.

The most important factor in this case is the evidence the State presented against Darden. The evidence against Darden was far from overwhelming. Essentially, the State's case hinged on the identification of Darden by two eyewitnesses, the victim's wife and a young boy employed part-time by the victim. There was very little corroborating evidence. Darden at all times denied any involvement in the crime. Furthermore, as I argued in my dissent to the original panel opinion, the eyewitness identifications were conducted, at the very least, in a highly suspect manner. Darden, supra, 699 F.2d at 1040-41 (Clark, J., dissenting). The closing arguments in numerous improper instances emphasized the reliability of eyewitness identification testimony, the lack of credibility of Darden as well as his "animal" nature, and stressed that death was the only sentence that would protect the public.

Using the Brooks test, the strength of the evidence against the accused is a factor in determining whether the argument exceeded constitutional limits.[3] It would seem that the evidence here is weaker than in any of the four cases recently decided by the en banc court. The

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[3] In Brooks, the majority at one point stated: "an outcome based on weak evidence might be more likely to have been affected by errors than one based on a very strong case." 762 F.2d at 1385.

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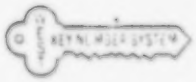
argument is as egregious as any. Thus, it would seem that the "but for" or prejudice test of Brooks has been satisfied in this case. Certainly it cannot be said that the argument had no effect on the sentencing decision. See Caldwell, supra, 105 S.Ct. at 2646. Therefore, I dissent.

vant information or called them as witnesses. Consequently, appellants' *Brady* claim is without merit.[5]

[5] Similarly, appellants' Sixth Amendment Confrontation Clause claim lacks merit. As noted above, the record simply does not support appellants' contention that without the psychiatric reports they were unable to cross-examine Marshall effectively. *Cf. United States v. Abbott*, *supra* (rejecting a similar challenge made by co-defendant Abbott regarding the "limitations" on cross-examination at his trial).

The judgment of the district court is AFFIRMED.



Willie Jasper DARDEN, Petitioner, Cross-Respondent,

v.

Louie L. WAINWRIGHT, Secretary Department of Corrections, State of Florida, Respondent, Cross-Petitioner.

No. 81-5590.

United States Court of Appeals, Eleventh Circuit.

Sept. 1, 1983.

Robert Augustus Harper, Jr., Gainesville, Fla., John Perry, Tallahassee, Fla., for petitioner, cross-respondent.

Richard W. Prospect, Asst. Atty. Gen., Daytona Beach, Fla., for respondent, cross-petitioner.

Appeals from the United States District Court for the Middle District of Florida.

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges, and MORGAN, Senior Circuit Judge.*

BY THE COURT:

On its own motion, the court en banc orders that the decision entered by it on July 1, 1983, 708 F.2d 646, affirming the decision of the district court by reason of an evenly divided court, is VACATED, and the court en banc will reconsider the case without oral argument during the week of September 12, 1983.

The execution of appellant Willie Jasper Darden is STAYED pending such reconsideration and further order by the court.

PURITAN INSURANCE COMPANY, Plaintiff-Appellee,

v.

BUTLER AVIATION-PALM BEACH, INC., Defendant-Appellant.

No. 82-3417.

United States Court of Appeals, Eleventh Circuit.

Sept. 19, 1983.

Suit arose out of theft of an airplane from premises of a fixed base operator at

strated that disclosure of the reports would have affected the outcome of the case.

5. The trial judge summarized the facts succinctly during a colloquy at trial when he made the following statement to one of appellants' attorneys: "You don't have the reports in your file to cross-examine him on because you haven't done anything for two months." Record on Appeal, vol. 3, at 106.

* Circuit Judge Joseph W. Hatchett, having recused himself, did not participate in this decision. Senior Circuit Judge Lewis R. Morgan elected to participate in this decision pursuant to 28 U.S.C. 46(c).

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IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT, IN
AND FOR CITRUS COUNTY, FLORIDA.

STATE OF FLORIDA :

VS : CASE NO. CT73-2027 C

WILLIE JASPER DARDEN :

FINDINGS OF FACT FOR SENTENCE

The Defendant, WILLIE JASPER DARDEN, was indicted by the Grand Jury of Polk County upon a charge of murder in the first degree. He was also charged in the same indictment with the offenses of robbery and assault with intent to commit murder at the same time and place as the charged murder. To each of the charges of this Indictment, he entered a plea of Not Guilty. After a change of venue was granted, trial was then held in Citrus County and the Defendant was found guilty of all charges by a jury of twelve persons.

The separate sentencing procedure provided by Florida Statute was then held before the trial jury. It returned an advisory sentence to the Court recommending the imposition of the death sentence. It becomes my duty to review the entire trial and sentencing procedure and enter written Findings of Fact and my conclusion from them of the proper and just sentence to be imposed under our capital felony law.

The victims of these offenses were each innocent, law abiding, decent citizens, calmly going about their every day affairs. The Defendant, at gun point, robbed Mrs. Turman at a rural area furniture store, without resistance from her. When her husband suddenly appeared at the back door of the store, the Defendant coldly immediately and without warning, shot and killed him in the door. Mr. Turman posed no threat to the Defendant and did not even have an opportunity to flee. The Defendant then, within a few feet of her dying husband, demanded that Mrs. Turman perform an unnatural sex act upon him. A 16 year old neighbor boy arrived in innocent ignorance to help the Turmans. He was rewarded by being shot three

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times by the Defendant, twice in the mouth and neck while he was stooping to help the dying Mr. Turman, and once in side or back as he fled.

At the time of the offense, the Defendant was on a weekend furlough from the State Prison where he was serving a sentence.

I find this evidence to show the offenses to be shocking, cruel, bestial and without any possible justification, excuse or provocation. They show a cold, heartless and vicious disregard for human life and dignity.

Another Judge of our Court previously had the Defendant examined to determine his mental competence. He was found to be competent. Shortly before the trial, at the request of Defendant's counsel, I ordered the further examination of the Defendant by a different, private clinical psychologist and a psychiatrist to determine if the Defendant, although competent, was subject to some personality disorder or emotional problem which in some way might explain or mitigate the atrocities committed. The Doctors reported they were unable to offer any mitigating opinion or evidence. I recite this not in aggravation, but to show the absence of mitigation in this regard.

The Defense essentially consisted of a denial that the Defendant was the man who committed the crimes. In mitigation, after conviction, the Defendant again emotionally and with what appeared on its face to be sincerity, proclaimed his innocence.

The evidence was sufficient to convince the jury of the guilt of the Defendant beyond a reasonable doubt. I concur in that conclusion.

I find from the evidence and the record the following aggravating circumstances:

(1) The capital felony was committed by the Defendant, WILLIE JASPER DARDEN, while he was under sentence of imprisonment.

(2) The capital felony was committed by him while he was engaged in the commission of a robbery.

(3) The capital felony was especially heinous, atrocious and cruel.

In mitigation I find the following circumstances:

(1) The Defendant is the father of seven children.

(2) The Defendant repeatedly professed his complete innocence of the charges.

I do, therefore, conclude, find and determine that sufficient aggravating circumstances exist as enumerated above to require imposition of the death sentence and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

I find the conclusion inescapable that the law in such cases made and provided, justice, good conscience and the general welfare of the State of Florida require me to impose the death sentence.

JOHN H. DEWELL, Circuit Judge

CERTIFIED TO BE A TRUE COPY
Attest: Walt Connors
CLERK CIRCUIT COURT
By _____ D. C.
this 14 day of June A. D., 19 78

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED

NO. 83-8028

WILLIAM ANTHONY BROOKS,

versus Petitioner-Appellant,

RALPH KEMP, Warden,
Georgia Diagnostic and
Classification Center,

Respondent-Appellee.

Appeal from the United States District Court for the
Middle District of Georgia

ON PETITIONS FOR REHEARING

(July 23, 1985)

BEFORE GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

Footnote 40 of the opinion is hereby deleted. In the last sentence of the second paragraph of footnote 39, the words "a claim" are hereby deleted, and the words "an argument" are substituted in lieu thereof.

IT IS ORDERED that the petitions for rehearing filed in the above-entitled and numbered cause be and the same are hereby DENIED.

ENTERED FOR THE COURT

United States Circuit Judge

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CLARK, Circuit Judge, dissenting, with whom KRAVITCH and JOHNSON, Circuit Judges, join:

I dissent from the decision of the en banc court to deny rehearing in this case. The majority's use of the Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) prejudice test (which requires that the petitioner show that but for the improper argument the result of the proceeding would have been different) is in conflict with the recently decided Supreme Court case of Caldwell v. Mississippi, 53 U.S.L.W. 4743 (June 11, 1985).

In Caldwell, the Supreme Court in evaluating the impact of an improper argument used by the prosecutor at the penalty phase of Caldwell's trial concluded:

> Because we cannot say that this effort [to minimize the jury's responsibility for determining the appropriateness of the death penalty] had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.

53 U.S.L.W. at 4748 (emphasis added).

The language used by the Supreme Court in Caldwell is, in essence, a paraphrase of the harmless error test used by the Court in numerous cases, most notably in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). As I maintained in my special concurrence in this case, the harmless error test is incompatible with the Strickland v. Washington prejudice test, which shifts the

burden of proof to the petitioner to demonstrate that but for the improper argument the result of the proceeding would have been different.

Furthermore, the prosecutor in this case made statements at the penalty phase indicating that he seldom sought the death penalty and then gave the factors he considered in deciding whether to seek the death penalty in a particular case. The majority of the en banc court was troubled by this type of argument, i.e., the prosecutorial expertise argument. The root of the en banc majority's concern was identical to that espoused by the Caldwell majority, i.e, that the prosecutor's statement would lessen the jury's sense of responsibility for determining the appropriateness of the death penalty. Additionally, the majority recognized that the argument in this case had at least some prejudicial effect. The majority stated:

> Although we cannot conclude that these few improper arguments had no prejudicial effect on the jury, we are satisfied the prejudice was not severe.

Brooks v. Kemp, No. 83-8029, slip op. at 4490 (11th Cir. May 31, 1985).

Therefore, the conclusion seems inescapable that our court's en banc opinion in this case conflicts with the Supreme Court's holding in Caldwell v. Mississippi, supra. The majority of our court found that the prosecutor's argument had some effect on the sentencing decision in Brooks' case. The Supreme Court in Caldwell held that the constitutional standard of reliability in the sentencing

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phase required another [illegible] which it was able to find than the prosecutor's argument had no effect upon the jury's decision. Consequently, I think we err when we do not reconsider our opinion in Brooks and I therefore dissent.

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FOR THE ELEVENTH CIRC[illegible]

No. [illegible]

WILLIAM BILLY TURNER,

Petitioner-Appellant,

versus

RALPH KEMP, Warden,

Respondent-Appellee.

- - - - - - - - - - - - -

Appeal from the United States District Court for the
Middle District of Georgia

- - - - - - - - - - - - -

ON PETITION FOR REHEARING

(JUL 23 1985)

BEFORE GODBOLD, Chief Judge, [illegible], HILL, [illegible], HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby [illegible]

ENTERED FOR THE COURT:

United States Circuit Judge

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REHG-4
(Rev. 6/82)

CLARK, Circuit Judge, dissenting, with [illegible] and JOHNSON, Circuit Judges, join:

I dissent from the decision of this court to deny rehearing in this case. The majority's use of the Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) prejudice test (which requires that the petitioner show that but for the improper argument the result of the proceeding would have been different) is in conflict with the recently decided Supreme Court case of Caldwell v. Mississippi, 53 U.S.L.W. 4743 (June 11, 1985).

In Caldwell, the Supreme Court in evaluating the impact of an improper argument used by the prosecutor at the penalty phase of Caldwell's trial concluded:

> Because we cannot say that this effort [to minimize the jury's responsibility for determining the appropriateness of the death penalty] had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment required.

53 U.S.L.W. at 4748 (emphasis added).

The language used by the Supreme Court in Caldwell is, in essence, a paraphrase of the harmless error test used by the Court in numerous cases, most notably in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). As I maintained in my dissent in this case, the harmless error test is incompatible with the Strickland v. Washington prejudice test, which shifts the burden of proof

[illegible] the petitioner to [illegible] argument the result of the proceeding would have been different.

Furthermore, the prosecutor in this case made statements at the penalty phase indicating that he seldom sought the death penalty and then gave the factors he considered in deciding whether to seek the death penalty in a particular case. The majority of the en banc court was troubled by this type of argument, i.e., the prosecutorial expertise argument. The root of the en banc majority's concern was identical to that espoused by the Caldwell majority, i.e, that the prosecutor's statement would lessen the jury's sense of responsibility for determining the appropriateness of the death penalty. Additionally, the majority recognized that the argument in this case had at least some prejudicial effect. The majority stated:

> We do not view the relatively small prejudicial impact of the improper arguments as undermining confidence in the sentencing verdict.

William Boyd Tucker v. Kemp, No. 83-8137, slip op. at 4421 (11th Cir. May 31, 1985).

Therefore, the conclusion seems inescapable that the Court's decision in Caldwell v. Mississippi, supra, coupled with the majority's concession of at least some prejudice, requires reconsideration of our opinion in this case. I therefore dissent.

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PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-8327

CHARLIE BENSON BOWEN,

Petitioner-Appellee,

versus

RALPH KEMP, Warden,
Georgia Diagnostic and
Classification Center,

Respondent-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(August 6, 1985)

Before FAY and JOHNSON, Circuit Judges, and YOUNG*, District Judge.

FAY, Circuit Judge:

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*Honorable George C. Young, U. S. District Court Judge for the Middle District of Florida, sitting by designation.

Petitioner, Charlie Benson Bowen, was convicted by a jury in Polk County, Georgia, of rape and murder. He was sentenced to life imprisonment for the rape charge and to death for the murder charge. Having exhausted his state court remedies, Bowen filed the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent, Ralph Kemp, Warden, Georgia Diagnostic and Treatment Center, appeals the district court's grant of the writ.

Respondent raises three issues on appeal: (1) whether the district court erred in holding that the state trial court's charge to the jury during Bowen's culpability trial improperly shifted the burden of proof on the element of intent, in violation of Sandstrom v. Montana, 442 U.S. 510 (1979), and was not harmless beyond a reasonable doubt; (2) whether the district court erred in holding that the prosecutor's closing argument during the sentencing phase of Bowen's trial rendered that phase fundamentally unfair; and (3) whether the district court erred in finding that Bowen was entitled to a new sentencing trial since the sentencing jury was drawn from an unconstitutionally composed traverse jury list. We affirm the district court's jury composition ruling and reverse the district court's rulings on the Sandstrom and prosecutorial argument issues.

I. PROCEDURAL HISTORY

Bowen was indicted in Polk County, Georgia, on charges of

raping and murdering a twelve-year old girl.[1] The trial jury found him guilty on both counts, and, pursuant to Georgia's bifurcated trial procedure, a jury thereafter sentenced him to life imprisonment for rape and to death for murder. On direct appeal, the Georgia Supreme Court affirmed the underlying convictions and rape sentence. The death sentence, however, was set aside and the case was remanded solely for resentencing on the murder conviction. Bowen v. State, 246 S.E.2d 322 (Ga. 1978).

In September of 1978, a Polk County jury again sentenced Bowen to death. The Georgia Supreme Court affirmed, Bowen v. State, 260 S.E.2d 855 (Ga. 1979), and the United States Supreme Court denied certiorari. Bowen v. Georgia, 446 U.S. 970 (1980).

Bowen then filed a petition for a writ of habeas corpus in the Superior Court of Butts County. The writ was denied, as was his application to the Georgia Supreme Court for a certificate of probable cause to appeal that denial. The United States Supreme Court again denied certiorari. Bowen v. Zant, 455 U.S. 983 (1982).

Bowen thereafter sought habeas relief in the United States District Court for the Northern District of Georgia. An evidentiary hearing was held before the United States Magistrate, who recommended that relief be limited to granting Bowen a new sentencing trial on the murder conviction. The district court agreed on this point, but went further; it also held that (1) the jury charge given during the guilt phase of Bowen's trial

impermissibly shifted the burden of proving intent, in violation of Sandstrom, and that this error was not harmless beyond a reasonable doubt, and (2) the prosecutor's closing arguments during the sentencing hearing rendered that phase of Bowen's trial fundamentally unfair.

II(a) THE SANDSTROM ISSUE

Bowen asserts that the following jury instruction impermissibly shifted the burden of proof on the element of intent, in violation of Sandstrom:

> The acts of a person of sound mind and discretion are presumed to be the product of the person's will but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his act but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the tryor [sic] of facts, that is you the jury, may find such intention upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted.

We agree.

The Supreme Court, in Franklin v. Francis, 53 U.S.L.W. 4495 (U.S. April 29, 1985), held that a portion of a jury charge virtually identical to the one at issue here "undeniably created an unconstitutional burden-shifting presumption with respect to the element of intent." Id. at 4498. The Court also rejected the state's argument, identical to the one advanced by respondent in the instant case, that any technical infirmity in the chal-

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lenged instruction was sufficiently cured by clarifying language found elsewhere in the charge. Id. at 4498-4500. "[B]ecause the charge read as a whole does not explain or cure the error, we hold that the jury charge does not comport with the requirements of the Due Process Clause." Id. at 4500. The district court did not err in finding that the instruction violated Sandstrom.

II(b) HARMLESS ERROR

The Supreme Court has not yet determined "whether an erroneous charge that shifts a burden of persuasion on an essential element of an offense can ever be harmless." Id. We recognize, however, that four members of the Supreme Court have suggested that a jury instruction violating Sandstrom cannot be considered harmless error except in "rare situations." Connecticut v. Johnson, 460 U.S. 73, 87 (1983) (plurality opinion). Since this position has yet to command a majority of the Court, we continue to apply the harmless error analysis in the Sandstrom context, as we do with most other errors of constitutional significance. See Tucker v. Francis, _____ F.2d _____ (11th Cir. 1985) (en banc) (M/S at 7); Davis v. Kemp, 752 F.2d 1515, 1521 (11th Cir. 1985) (en banc).

The Davis Court fleshed out the contours of the harmless error inquiry as it relates to a Sandstrom violation. Davis recognized that this circuit has identified two situations where

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the harmless error rule can be invoked. Harmless error analysis is proper "if the evidence was overwhelming as to the defendant's guilt and if the instruction was applied to an element of the crime which was not at issue at the trial." Id; accord, Tucker, _____ F.2d _____ (M/S at 8); Brooks v. Francis, _____ F.2d _____ (11th Cir. 1985) (en banc) (M/S at 8). Davis further states that with respect to the first situation, the court's analysis should "focus on whether evidence of intent, rather than the more inclusive issue of guilt, is overwhelming." Tucker, _____ F.2d _____ (M/S at 8) (emphasis in original) (citing Davis, 752 F.2d at 1521 & n.10). In this regard, the nature of the defense asserted at trial may be an important factor. See Brooks, _____ F.2d _____ (M/S at 9).

A reading of Davis and its progeny reveals that when a court focuses on the degree of evidence of intent, it should examine the evidence without reference to the particular defendant. In other words, the court should examine the evidence as if the allegedly criminal conduct had been performed by some anonymous actor. For example, in Davis, where the defense essentially was non-involvement, the Court examined the circumstances of the victim's death and concluded "that whoever killed the victim did so with intent and malice." Davis, 752 F.2d at 1521. In Tucker, another non-involvement defense case, the Court reasoned that the evidence was overwhelming that whoever killed the victim did so intentionally because "the victim died of one crushing blow to the skull by a blunt instrument." Tucker, _____

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F.2d _____, (M/S at 9). A similar tack was taken in Brooks, a case in which the defendant asserted accident as his defense. In holding the Sandstrom violation to be not harmless beyond a reasonable doubt, the Brooks Court emphasized that the evidence of intent was not overwhelming because of the manner in which the victim was killed. Brooks, _____ F.2d _____ (M/S at 10-14 & n.14).

Using this approach, we conclude that the evidence of intent to kill Sheila Denise Young, the victim in this case, was overwhelming. The child's nude body was found beside a bloodied mattress in a vacant house. She had been stabbed fourteen times about the face, chest, and abdomen, and died because of loss of blood. Her death obviously was not the result of accident, mistake, or negligence, but rather was the result of an "intentional" act.

Moreover, Bowen, in a very real sense, conceded the issue of intent. In discussing those "rare situations" where the Connecticut v. Johnson plurality might employ the harmless error rule, Justice Blackmun stated:

> [A] Sandstrom error may be harmless if the defendant conceded the issue of intent. See, e.g., Krzeminski v. Perini, 614 F.2d 121, 125 [6th Cir.], cert. denied, 449 U.S.866 (1980). See also Washington v. Harris, 650 F.2d 447, 453-454 [2d Cir. 1981], cert. denied, 455 U.S. 951 (1982). In presenting a defense such as alibi, insanity, or self-defense, a defendant may in some cases admit that the act alleged by the prosecution was intentional, thereby sufficiently reducing the likelihood that the jury applied the erroneous instruction as to permit the appellate court to consider the error harmless.

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Connecticut v. Johnson, 460 U.S. at 87 (emphasis added). Bowen's sole defense at trial was insanity; he never denied that he repeatedly stabbed Sheila Denise Young. By relying exclusively on an unsound mind defense, Bowen effectively conceded that if his defense were not accepted, it could not be gainsaid that his acts were anything but intentional.

The instant case is readily distinguishable from Engle v. Koehler, 707 F.2d 241 (6th Cir. 1983), aff'd by an equally divided Court, 104 S. Ct. 1673 (1984) (per curiam), a factually similar case relied upon by the en banc Court in Davis. The defendant in Koehler was convicted of first degree murder. His "sole defense was temporary insanity because of the effects of alcohol, drugs and dissociative reaction." Koehler, 707 F.2d at 243. The Sixth Circuit found that a Sandstrom burden-shifting instruction was not harmless error beyond a reasonable doubt, and therefore granted habeas relief. Id. at 246. The court reasoned that the Sandstrom violation was not harmless because the evidence concerning the defendant's lack of mens rea defense was conflicting. Id.

The similarity between the instant case and Koehler ends, however, with the Sandstrom violations and the defenses asserted. The instruction condemned in Koehler stated that "the law gives us a rule of thumb that a person is presumed to intend the natural consequences of his acts." Id. at 243 (emphasis in original). The clear import of this instruction is that the

presumption applies to all persons, whether sane or not. In the instant case, however, the offensive presumption would not become operative unless and until the jury found that Bowen was "a person of sound mind and discretion." In other words, if the jury accepted Bowen's insanity defense, and he thus was considered a person of unsound mind, the jury could not presume that he intended the natural and probable consequences of his acts.[2] But the jury did not accept Bowen's defense. Consequently, the jury conceivably could have relied on the "mandatory rebuttable presumption." By that point, however, Bowen's sole defense already had fallen by the wayside, and intent no longer was a viable issue in the trial.

Franklin v. Francis, 720 F.2d 1206 (11th Cir. 1983), aff'd, 53 U.S.L.W. 4495 (U.S. April 29, 1985), is instructive by way of comparison. In Franklin, the court found that an instruction identical in all material respects to the one at issue here violated Sandstrom. The court held that the error was not harmless since the facts did not overwhelmingly preclude the defendant's accident defense. The court reasoned: "A presumption that Franklin intended to kill completely eliminated his defense of 'no intent.'" Franklin, 720 F.2d at 1212 (emphasis added).

The lesson of Franklin is clear: A Sandstrom violation will not be deemed harmless if the presumption works to deprive the defendant of an asserted defense that is plainly at issue. Here, unlike the situation in Franklin, the defendant's sole defense had been "completely eliminated" before the proscribed

presumption could have become operative. Cf. Connecticut v. Johnson, 460 U.S. at 98 n.6 (Powell, J., dissenting) ("The question of intent is one of fact and . . . before a jury even reaches the presumption instruction it must find facts that are a predicate for the presumption.").

Based on the foregoing, we hold that it is beyond a reasonable doubt that the Sandstrom error in this case did not contribute to Bowen's murder conviction. The error was harmless and we therefore reverse the district court's holding to the contrary.

III. PROSECUTORIAL ARGUMENT

Bowen challenges portions of the prosecutor's closing argument during the sentencing phase of his trial. Bowen argued in his petition filed in the district court that the following passage improperly raised the possibility that he might be paroled from a life sentence:

> [The Prosecutor]: And now we come up here with this idea that here is a man that even though he knew that he himself . . . even though he was convicted in his own heart and he desired to die and we are approached with the proposition that he is subject to be rehabilitated and released back into society.
>
> Yeah, I guess he can be rehabilitated. Hitler could have been. I believe in about six or eight months if I'd had him chained to a wall and talked to him and beat him on one side of the head for a while with a stick telling him you believe this don't you then beat him on the other side with a stick telling him you believe that don't you I believe I could have rehabilitated Hitler.

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> Yeah, it's conceivable that he could come back into society. It's conceivable that he can go back to work at Goodyear Mills in the twister room. Yeah, it's conceivable that he can go see Angie some more. Yeah, it's conceivable that he can be let out to gamble, it's conceivable that he can be let out to drink his beer and smoke his marijuana, and it's conceivable that he could pick up another little twelve year old girl, if you want him to all you've got to do is . . .
>
> [Defense Counsel]: I'm going to object to this line or [sic] argument. Your honor, I think this is going beyond the bounds of a fair argument and I suggest that he be directed to cease from that.
>
> The Court: I overrule your objection.
>
> [The Prosecutor]: They say he can come back into society. Some of them would welcome him with open arms but I'm not. They can call me what they wish, unchristian or whatever they want to. I'm not willing to. I'm willing to abide by your determination because it's a determination you must make.

Tr. at 576-77.

The district court, on the basis of this and other statements made by the prosecutor in his closing argument which will be discussed below,[3] held that Bowen's sentencing trial was rendered fundamentally unfair. We disagree.

The law is clear that habeas relief will not be given for improper prosecutorial arguments unless those arguments rendered the sentencing proceeding "fundamentally unfair." Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974); see Brooks, _____ F.2d _____ (M/S at 26); Tucker, _____ F.2d _____ (M/S at 12); Drake v. Francis, _____ F.2d _____ (11th Cir. 1985) (en banc) (M/S at 16-17). To make that determination, the reviewing court must decide whether there is a reasonable probability that, had the

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remarks not been made, the sentencing outcome would have been different. Brooks, _____ F.2d _____ (M/S at 31) (citing Strickland v. Washington, _____ U.S. _____, 80 L.Ed.2d 674, 698 (1984))

As an initial matter, we interpret the content of the argument quoted above as more a comment on Bowen's future dangerousness and prospects for rehabilitation than an injection of the possibility of parole into the sentencing hearing. Throughout the sentencing hearing, defense counsel attempted to portray Bowen as a person who converted to Christ after his incarceration for killing Sheila Denise Young. For example, J.D. Bryant, a deputy sheriff with the Polk County Sheriff's Department, was called to testify on behalf of Bowen. Bryant worked at the jail where Bowen had been housed since his arrest. Bowen's counsel specifically asked Bryant if he had "any opinion regarding [Bowen's] potential for rehabilitation and return to society." Tr. at 278. Bryant, a Baptist minister, testified that in his opinion, Bowen truly had experienced a religious conversion and now was a "model individual" who "could participate in society and become a useful member of society." Id.

The en banc court has made it clear that consideration of future dangerousness "is a proper element in the sentencing jury's decision." Brooks, _____ F.2d _____ (M/S at 48). "Similarly, . . . the jury may appropriately consider whether [the] defendant is . . . so unlikely to be rehabilitated that incapacitation is warranted." Id. at _____ (M/S at 39). The prosecutor

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therefore did not act improperly when he attempted to nullify Bowen's characterization of himself as a person who was fully rehabilitated as the result of a recent spiritual metamorphosis.

We nonetheless agree with the district court that the challenged argument improperly stated the prosecutor's personal opinion regarding Bowen's potential for rehabilitation. The Supreme Court, in a related context, recently stated:

> The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its view of the evidence.

United States v. Young, 105 S. Ct. 1038, 1048 (1985). Additionally, "[a]n attorney's personal opinions are irrelevant to the sentencing jury's task." Brooks, _____ F.2d _____ (M/S at 41).

It is clear that the Hitler analogy was an improper statement of the prosecutor's personal opinion regarding Bowen's rehabilitative potential. Similarly, the prosecutor's personal feelings concerning Bowen's possible return to society were irrelevant and improperly put before the sentencing jury.

The district court also condemned the following arguments made by the prosecutor: "If you [the jury] want him [to return to society as a rehabilitated man] fine, but I don't want him in my society;" Tr. at 564; "I wish [Bowen] had woke up dead." Id.

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at 575. Although these statements arguably advocate the appropriateness of retribution, a penological justification for the death penalty which is properly considered by the jury, Brooks, _____ F.2d _____ (M/S at 38-39), the fact remains that they were couched in the form of personal opinions. These arguments therefore also were improper.

The district court took issue with the prosecutor's characterization of Bowen as "a product of the devil," Tr. at 565, "a liar," id. at 567, who was "no better than a beast." Id. at 569. We address these in turn.

With respect to the first of these remarks, we note that the prosecutor was not referring specifically to Bowen, but rather was commenting on the insanity defense in general. The prosecutor was simply making the point that not all perpetrators of heinous crimes are insane and that society has "gotten away from the old time idea that [a defendant can commit a vicious crime] because [the defendant is] a product of the devil, and [the defendant commits the crime] because [he does not] care." Id. at 565. Although dramatic, we do not view this argument as improper.

We also do not regard the prosecutor's statement that Bowen was a liar as improper. When the term was used, the prosecutor was arguing to the jury that Bowen did not act like a person who was disoriented and out of touch with reality when he killed Sheila Denise Young. The prosecutor argued that Bowen tried to cover up the fact that he had attacked his own daughter shortly

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before the crimes for which he was convicted. The prosecutor stated: "But he wanted to hide the fact it was him. If he was out of touch with reality what did it matter. He'd say why sure, I did that. No, he lied to his wife about it and he lied to everybody about it. . . ." Id. at 567. The prosecutor's argument has ample support in the record and is not improper.

The reference to Bowen as "no better than a beast" was made as part of an argument that Bowen, who apparently attempted to commit suicide shortly after he attacked his daughter, himself believed that he should forfeit his life for attacking his own flesh and blood. This reference was supported by the evidence and was not improper. See Tucker, _____ F.2d _____ (M/S at 18-19) (description of defendant as "less than human" not improper where supported by the evidence).

The following argument also was censured by the district court: "We are living in the days of Cain and the voices heard are Abel's crying out to us all the time the voices of the murdered cry out. . . . To whom do they call? The can only call to the ministers of the law for recompense or vengence [sic]. . . . As a juror, you are a minister of the law. The only place Sheila Denise Young has to appeal to is you." Tr. at 578-79. This argument was, in our view, not improper.

"It is completely appropriate to remind the jury of the importance of its sentencing decision." Tucker, _____ F.2d _____ (M/S at 20). This is precisely what the prosecutor did here, albeit in rather colorful prose. He did not argue that any

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future victim of Bowen would be on the jury's conscience, nor did he state that the jurors were the only persons who could stop Bowen from killing again. See id. at 21. Rather, the prosecutor was bringing home the point that the jurors were the only "ministers of the law" able to exact appropriate retribution from the slayer of Sheila Denise Young. This was proper argument. Cf. Brooks, _____ F.2d _____ (M/S at 49) ("The reminder to the jury that 'the buck stops with you today' was an appropriate reference to the fact that the jury must make the ultimate decision.").

The final argument the district court relied upon to invalidate the sentencing hearing went as follows: "You know for a criminal to go without proper punishment is a disgrace to the society we live in and it's shown to us every day by the fruits that we reap from day to day in our society when we have the bloody deeds such as this occur." Tr. at 579. Standing alone, this passage does not appear to be an improper argument. When read in context, however, it is clear that the prosecutor was giving his watered-down rendition of an argument found improper by the en banc Court in Drake, _____ F.2d _____.[4]

Immediately before the challenged argument the prosecutor stated:

> You know one of our noted justices once said that the sickly sentimentality that causes us to shirk whenever the axe of justice is about to fall that it is not true sentimentality, that it cannot produce true justice, that it may be the sign of a tender heart but it is also a sign of one not under proper regulation.

> Now, society, this is in the words of a justice, demands that crime be punished for criminal deeds and false humanity starts and shudders when the axe of justice is ready to strike is a dangerous element to peace and society. That's true today. Justice as it has been for years and years.
>
> Now we've had too much of this and it's not true. We must insist on mercy for society and not always look to the criminal convicted of hideous, monstrous, vile, outrageous acts.

Tr. at 579 (emphasis added). Immediately after the challenged argument, the prosecutor stated:

> But do you know what it would take to stop it, a stern, unbending, unflinching administration of the law, stern punishment by people who stand for something, are willing to stand up and fulfill the commands of the law.

Id. at 579-80.

In light of Drake, we conclude that this argument was improper. Although the prosecutor did not specifically invoke the Supreme Court of Georgia to abjure mercy, as was the case in Drake, he did attribute to a "justice" the view that opting for mercy was frowned upon. The argument was not as prejudicial as the one challenged in Drake, see infra note 5, yet nonetheless was improper.

We have identified two types of improper prosecutorial argument at Bowen's sentencing trial: (1) the prosecutor's statements of his personal opinions; and (2) the prosecutor's suggestion that a "noted justice" believed that mercy was an inappropriate consideration for Bowen. Because the improper

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arguments focused in the main on Bowen's rehabilitative prospects and the propriety of mercy, we conclude that they did not influence the jury's finding of aggravating circumstances. Indeed, Bowen does not even contend that the argument found improper by the district court affected the jury's finding that the murder was horrible or inhuman because it involved torture. See Ga. Code Ann. § 17-10-30(b)(7); Tr. at 613. Therefore, under Georgia law, Bowen was eligible for the death penalty.

That, however, does not end the inquiry. As we have seen, see supra p. 11-12, the recent en banc decisions of this Court instruct that to determine whether improper arguments rendered a sentencing trial fundamentally unfair, we should ask whether there is a reasonable probability that, in the absence of those arguments, the death penalty would not have been imposed. See, e.g., Brooks, _____ F.2d _____ (M/S at 31, 52). "This inquiry involves an evaluation of the improper remarks in the context of the entire proceeding. . . ." Id. at 52.

The prosecutor improperly put before the jury his personal opinions. The principal thrust of his argument, however, made it clear that only the jury could decide whether or not Bowen should be executed. The prosecutor began his argument by stating that "it is necessary that you twelve jurors decide what punishment [Bowen] is to receive for the offense of murder." Tr. at 560. Further along in his argument the prosecutor conceded that "I'm willing to abide by your [the jury's] determination because it's a determination you [the jury] must make." Tr. at 577. He also

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said that "[t]he only place that Sheila Denise Young has to appeal to is you [the jury]." Id. at 579. Thereafter, the prosecutor specifically advised the jury that "in order to fulfill the commands of the law in this case you do whatever you wish." Id. at 580. The prosecutor concluded his argument by exhorting the jurors to search their consciences and souls and return a verdict of death, yet recognized that "[t]hat's a decision you [the jury] must make." Id. at 581.

The trial judge's instructions also made it abundantly clear that no one save the jury was responsible for the ultimate decision, life or death for Bowen. In the first paragraph of his charge, the judge instructed the jury that "[y]ou [the jury] have been empowered to fix the punishment for the offense for which [the defendant] has already been convicted." Id. at 605. In the next paragraph, the judge charged that the jurors "are the judges of the law and facts of this case. . . . You are made the exclusive judges as to the credibility of witnesses." Id. The judge also charged the jury that even if the state proved the existence of an aggravating circumstance, the jury "would [still] be authorized to fix the punishment of the defendant at life imprisonment." Id. at 609. The judge further instructed that the verdict forms "are not in any manner to suggest to you what your verdict should or should not be. That is entirely up to you." Id. at 610.

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In these circumstances, we have little difficulty concluding that the jury understood that it bore sole responsibility for the sentencing decision and that the prosecutor's opinions were no more than that. The improper statements of opinion were fairly isolated within the body of the prosecutor's argument, and represented only a small part thereof. Any prejudice from the improper remarks was for the most part alleviated by other statements of the prosecutor and the judge's charge. We find no reasonable probability that, absent the improper statements of opinion, Bowen would not have been sentenced to death.

Similarly, we hold that there is no reasonable probability that the prosecutor's invocation of the views of a "noted justice" changed the outcome of the sentencing hearing. First, as previously noted, the thrust of the prosecutor's own argument made it unmistakeably clear that the jury could do as it pleased. Bowen's counsel also emphasized the fact that, under Georgia law, the jury could opt for life rather than death, even if it found the existence of an aggravating circumstance, after considering all the circumstances. See id. 600-01 ("[E]ven if you find that this was a vile heinous act you still have the option because of considering the man of awarding that man a life sentence instead of a death sentence"); id. at 602 ("[I]f you consider the true Charlie Bowen . . . as the evidence really pictures him, . . . then . . . you have the opportunity to award him a punishment of life in prison rather than being put to death, even for the offense of murder"); id at 604 ("[T]he law

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doesn't say you've got to put a man to death because he murdered somebody and I don't think Charlie Bowen deserves death and...there's evidence here to show you that he doesn't deserve death"). Most importantly, the trial judge, when instructing the jury on mitigating circumstances, advised the jury that mitigating circumstances do not justify or excuse the offense, "but . . .in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability." Id. at 607. The judge also charged the jury that despite the presence of aggravating circumstances, it could fix the punishment of Bowen at life imprisonment "for any reason that is satisfactory to you [the jury]." Id. at 609. The court further instructed the jury that their decision should be informed by "consideration [of] all the evidence, all the surrounding facts and circumstances, and the law as given you . . . by the court." Id. at 610. Finally, as we stated in our discussion of the improper statements of personal opinion, the trial court made it very clear to the jurors that it was entirely up to them whether or not Bowen should be given a death sentence.[5]

The improper argument suggesting the judicial disapproval of mercy does not undermine our confidence in the outcome of the sentencing hearing. We accordingly reverse the district court's ruling that Bowen's sentencing hearing was rendered fundamentally unfair by improper prosecutorial argument.

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IV. COMPOSITION OF THE TRAVERSE JURY LIST

The district court concluded that Bowen was sentenced to die by a jury drawn from a list which unconstitutionally excluded women.[6] We agree.

Decisions by the Supreme Court and this court make it clear that a defendant may challenge the discriminatory selection of state court juries under the equal protection clause of the fourteenth amendment, see Rose v. Mitchell, 443 U.S. 545 (1979); Castaneda v. Partida, 430 U.S. 482 (1977); United States v. Sneed, 729 F.2d 1333 (11th Cir. 1984); Gibson v. Zant, 705 F.2d 1543 (11th Cir. 1983), and the sixth amendment, which vouchsafes the right to be tried by a jury chosen from a group reflecting a fair cross-section of the community. See Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975); United States v. Tuttle, 729 F.2d 1325 (11th Cir. 1984), cert. denied, 105 S. Ct. 968 (1985); Gibson, 705 F.2d 1543. We have noted that the equal protection analysis employs a prima facie case test virtually identical to the one used in the fair cross-section analysis. See Tuttle, 729 F.2d at 1327 n.2; Gibson, 705 F.2d at 1546; United States v. Perez-Hernandez, 672 F.2d 1380, 1384 n.5 (11th Cir. 1982).[7]

The Supreme Court delineated the contours of the equal protection challenge in Castaneda, where it stated:

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> The first step is to establish that the group is one that is a recognizable, distinct class. . . . Next the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as . . . jurors, over a significant period of time. . . . Finally, . . . a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing.

Castaneda, 430 U.S. at 494 (citations omitted); Mitchell, 443 U.S. at 565. More recently, the Supreme Court set forth the elements of a fair cross-section prima facie case. To prevail on a sixth amendment jury composition challenge:

> [T]he defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren, 439 U.S. at 364. After carefully reviewing the record, we hold that the district court correctly concluded that Bowen established a fourteenth amendment prima facie case.[8]

Respondent concedes that since women constitute a recognizable, distinct class, see Duren, 439 U.S. at 364 (citing Taylor, 419 U.S. at 531); Sneed, 729 F.2d at 1335, the first prong of the Castaneda test has been satisfied. The gravamen of his quarrel with the district court, however, focuses on the weight the court

accepted the statistical disparity between the percentage of women residing in Polk County and the percentage of women on the traverse jury list.

Bowen was sentenced to die in 1978 by a jury drawn from the traverse jury list composed in the fall of 1977. The statistics admitted into evidence in the district court reflect a disparity of -22.7% between the percentage of women residing in the county and the percentage of women on the 1977 traverse jury list. The record further shows that this disparity was not an aberration; rather, the underrepresentation of women was even more dramatic in the four preceding traverse jury lists.[9]

In the face of this evidence of a clear historical pattern of female underrepresentation on Polk County's traverse jury lists, respondent insists that the statistical disparities are not constitutionally significant. We do not agree.

We acknowledge that the Supreme Court has eschewed pronouncing precise mathematical standards for proving systematic exclusion of distinct classes, see Alexander v. Louisiana, 405 U.S. 625, 630 (1972), and that we have followed its lead. See, e.g., Gibson, 705 F.2d at 1547; Bryant v. Wainwright, 686 F.2d 1373, 1376 (11th Cir. 1982), cert. denied, 461 U.S. 932 (1983). We do not, however, write on a clean slate. In factually similar cases, the Supreme Court, this court, and the former Fifth Circuit[10] all have found statistical variances near the 22.7% disparity present in this case to be constitutionally significant. E.g., Turner v. Fouche, 396 U.S. 346 (1970) (23%);

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Hernandez v. Texas, 347 U.S. 475 (1954) (14%); Gibson, 705 F.2d 1543 (20% and 38%); Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982) (36% and 42%), cert. denied, 459 U.S. 1127 (1983); Porter v. Freeman, 577 F.2d 329 (5th Cir. 1978) (20.4%). We therefore have no difficulty concluding that the 22.7% variance between the percentage of women residing in Polk County and the percentage of women on the 1977 traverse jury list, immediately preceded by nearly a decade of even greater underrepresentation, is sufficient to satisfy the second prong of the Castaneda test.

The district court also found that the process employed by the Polk County jury commissioners in composing the traverse jury list was susceptible of abuse as a tool of discrimination. We agree.

The Georgia law in effect when the 1977 traverse jury list was composed provided:

> At least biennially, or, if the senior judge of the superior court shall direct, at least annually, the board of jury commissioners shall compile and maintain and revise a jury list of intelligent and upright citizens of the county to serve as jurors. In composing such list the commissioners shall select a fairly representative cross section of the intelligent and upright citizens of the county from the official registered voters' list of the county as most recently revised by the county board of registrars or other county election officials. If at any time it appears to the jury commissioners that the jury list, so composed, is not a fairly representative cross section of the intelligent and upright citizens of the county, they shall supplement such list by going out into the county and personally acquainting themselves with other citizens of any significantly identifiable group in the county which may not be fairly represented thereon.
>
> After selecting the citizens to serve as jurors, the jury commissioners shall select from the jury list

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> a sufficient number of the most experienced, intelligent and upright citizens, not exceeding two-fifths of the whole number, to serve as grand jurors. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, except as otherwise provided herein, and no new names shall be added until those names originally selected have been completely exhausted, except when a name which has already been drawn for the same term as a grand juror shall also be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead.

Ga. Code Ann. § 59-106 (current version at Ga. Code Ann. § 15-12-40 (1982)). Although the Supreme Court has characterized this method of selection as "not inherently unfair," Turner, 396 U.S. at 355, it also has recognized that the statute contained the potential for abuse. Id. at 356 & n.14. It is necessary, therefore, to examine the testimony of the Polk County jury commissioners to determine whether the process they used to compose the traverse jury list was susceptible of abuse or not facially neutral.

Members of the jury commission testified both in the state trial court and in the district court. The following passage from the Georgia Supreme Court's summary of the state court jury composition hearing underscores the largely subjective approach taken by the jury commissioners:

> At the hearing on the jury challenge, several members of the Polk County Jury Commission were called to testify. Of the jury commissioners, four are white males, one is a white female, and one is a black male. The jury commissioners testified to the following effect: the appellant's jury was struck from a traverse jury panel which had been most recently revised in September-October, 1977. The panel was drawn from a 1975 Polk County voters registration list, a list of county voters who had voted in the last

general election, a list of persons under court jurisdiction, telephone books, and city directories. The primary source from which the jurors were drawn was the list of voters who had voted in the last election. The commission was given brief instructions from the Polk County Superior Court Judge, including an instruction to have males, females, blacks and whites on the jury list. The commission met as a group and discussed each name considered. They were considered on the basis of each jury commission member's acquaintance with them - specifically on the basis of character, ability, and capability to be a juror. If everybody approved, the name would be placed on the jury list. The commission did not put anyone on the jury list about whom someone on the commission did not know something. They did not take any investigative action to get to know people they did not know. (The jury commissioners were not aware of their duty, imposed by Code § 59-106 (1976 amendment), to supplement the jury list by going out into the county and personally acquainting themselves with other citizens of the county, if it appeared that the jury list, as composed, was not a fairly representative cross-section of the intelligent and upright citizens of the county.) Blacks were designated with "(c)" on the voters lists furnished to the panel, but all of them, particularly the black jury commissioner, knew pretty well the great majority of the black community. They did not know the percentages of male-female or black-white in Polk County, but no one was excluded from the traverse jury panel because of race, age or sex; and it was the aim of the jury commission to secure a cross-section of people from the community for the traverse jury panel.

Bowen v. State, 260 S.E.2d at 857-58 (emphasis added). At the federal habeas hearing, the jury commissioners who testified reiterated that no one was placed on the traverse jury list who was not personally known by one of the commissioners. The district court concluded that this method of selection was susceptible of abuse. Record, Vol. 1 at 215.

Respondent argues that in addressing the third prong of the Castaneda test, the district court improperly focused on only the subjective attributes of the selection process. Respondent urges that the court should have incorporated into its analysis (1) the fact that a woman and a black man were members of the 1977 jury commission; (2) the fact that the jury commissioners did not rely exclusively on the voters registration list to compose the traverse jury list; and (3) the commissioners' assertions that no one was excluded from the list solely on the basis of race or gender. Respondent also argues that the commissioners' collective familiarity with nearly everyone in the county could have prevented abuse of the method of selection. These arguments, however, miss the mark and evince a fundamental misunderstanding of both the third prong of the Castaneda test and the distinction between a prima facie case and a rebuttal case.

To fulfill the third requirement of Castaneda, Bowen was obliged to show that the traverse jury selection process used in 1977 contained the potential for abuse. Bowen clearly made such a showing: (1) the jury commissioners knew the gender of every potential juror; (2) the commissioners were, as a group, personally familiar with practically everyone in the county; and (3) the commissioners discussed amongst themselves the qualifications of each person considered. That a member of the jury commission was black or female, or that several sources were used to gather names, neither magically removes from this process its highly subjective component nor diminishes the ease with

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[illegible] the process could have been manipulated. The same is true of the jury commissioners' assertions that they did not discriminate. This testimony, properly viewed, is at best an attempt to overcome the prima facie case of discrimination. Since the district court correctly concluded that Bowen established a Castaneda prima facie case, the only remaining question is whether or not the court erred in holding that respondent failed to rebut it.

To successfully rebut the prima facie showing of unconstitutional action, the state must present sufficient evidence to "dispel the inference of intentional discrimination." Castaneda, 430 U.S. at 497-98. Although there is no litmus test by which to judge a rebuttal case, it is clear that evidence in rebuttal must focus on "showing that permissible [gender] neutral selection criteria and procedures" have produced the underrepresentation of women on the traverse jury list. Alexander, 405 U.S. at 632; Guice v. Fortenberry, 722 F.2d 276, 280 (5th Cir. 1984); Perez-Hernandez, 672 F.2d at 1387. While the testimony of alleged discriminators should not be summarily dismissed, see Castaneda, 430 U.S. at 498, it should be examined with a healthy amount of judicial scrutiny. Perez-Hernandez, 672 F.2d at 1387. Specifically, "affirmations of good faith in making . . . selections are insufficient to dispel a prima facie case of systematic exclusion." Alexander, 405 U.S. at 632; Castaneda, 430 U.S. at 498 n.19; Guice, 722 F.2d at 280; Gibson, 705 F.2d at 1549. The district court applied these principles to the evidence before

it, and properly found that respondent failed to carry his burden.

Respondent argues here, as he did unsuccessfully in the district court, that this case is distinguishable in crucial respects from Alexander, Castaneda, and their progeny. In support of his position, respondent again directs our attention to the fact that the jury commissioners were neither all white nor all male, to the commissioners' use of multiple sources to gather names of potential jurors, and to the commissioners' denials of discrimination and their asserted awareness of the duty to include on the traverse jury list a fair cross-section of the community. Respondent submits that if the aggregation of these facts does not constitute a successful rebuttal case, none really exists. We are compelled to disagree.

Initially, the fact that a black man and white woman were members of the 1977 jury commission may be irrelevant. The Supreme Court has made it clear that in examining a state's rebuttal case, a court may not presume that persons of a particular class would not discriminate against others of the same class. Castaneda, 430 U.S. at 500. Moreover, regardless of the number and nature of the sources utilized by the jury commissioners to compile names of potential jurors, the fundamental fact remains that "the opportunity to discriminate was presented at later stages in the [jury selection] process." Alexander, 405 U.S. at 632. When respondent's rebuttal case is thus reduced, we are left with the jury commissioners' denials of discrimination.

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True, the testimony of alleged discriminators is not per se insufficient to rebut an equal protection prima facie case. See Perez-Hernandez, 672 F.2d at 1387. It is, however, subject to being weighed by the trial court in considering all the evidence presented. There is a notable absence in this record of any adequate explanation for the clear pattern of female underrepresentation on the traverse jury lists in Polk County. The record provides ample support for the finding of the district court that respondent failed to overcome Bowen's prima facie case of purposeful discrimination. In the words of the Supreme Court, "the opportunity for discrimination was present and [it cannot be said] on this record that it was not resorted to by the commissioners." Alexander, 405 U.S. at 632 (quoting Whitus v. Georgia, 385 U.S. 545, 552 (1967)).

V. CONCLUSION

For the reasons stated in Section II(b), the judgment of the district court in granting habeas corpus relief on the Sandstrom claim is REVERSED.

For the reasons stated in Section III, the judgment of the district court in granting habeas corpus relief on the prosecutorial argument claim is REVERSED.

For the reasons stated in Section IV, the judgment of the district court in granting Bowen a new sentencing trial is AFFIRMED and the case REMANDED for the granting of appropriate relief. Bowen is entitled to a new sentencing proceeding before a properly empaneled jury.

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FOOTNOTES

1. For a detailed discussion of the historical facts in this case, see Bowen v. State, 246 S.E.2d 322 (Ga. 1978).

2. Apart from the language of the challenged instruction, other instructions in the trial court's charge make it clear that acceptance of Bowen's insanity defense would preclude resort to the offensive presumption. After instructing the jury on Bowen's insanity defense (Bowen does not challenge these instructions and we therefore assume they were proper), the court stated:

> [I]f you find that the defendant did not have reason sufficient to distinguish between right and wrong, as I have instructed you, at the time of the commission of the alleged offense . . ., that would be an end to your consideration of the case and you would stop at that point and enter a verdict that would reflect that finding.

Tr. at 463 (emphasis added).

In the next paragraph of its charge, the court instructed the jury:

> If, however, from a consideration of the evidence you determine that at that time and place of the occasion under investigation in this trial that the defendant was sane and thus responsible in such event you would proceed to consider the other portions of the charge that I have given you, or am about to give you.

Id. (emphasis added).

3. In his habeas petition, Bowen specifically contested only the prosecutorial argument quoted supra in the text. This also was the only argument objected to by trial counsel in the sentencing hearing. The district court, however, examined the challenged argument in light of the prosecutor's entire closing. In the court's view, the challenged argument, when considered with other arguments the court found objectionable, rendered the sentencing hearing fundamentally unfair. Because the district court considered arguments which were not objected to at trial, and respondent does not contend here that that consideration was improper, we find it appropriate to address all the arguments the district court regarded as improper.

4. The Drake court found the following argument "extremely improper." Drake, _____ F.2d _____ (M/S at 18):

> If your Honor please, in connection, in my urging you to submit this to the jury, the State of Georgia, the Supreme Court of Geo.gia in Hawkins v. State, in 25 Ga., page 207, the Court, in upholding the murder and the death sentence in that case said this: "Human life is sacrificed at this day throughout the land with more indifference than the life of a dog, especially if it be a good dog." They went on to hold that Cain was the first murderer, but who was the last is known only to those who have read this morning's papers. And they said, "If this crime goes unpunished, let our skirts at least be free from the stain of blood guiltiness."
>
> If your Honor please, in Eberhart v. State, 47 Ga., page 610, the Justice of the Supreme Court of Georgia said this, in connection with the death sentence for murder: "We have, however, no sympathy with that sickly sentimentality that springs into action whenever a criminal is at last about to suffer for a crime. It may be a sign of a tender heart, but it is also a sign of one not under proper regulation. Society demands that crime shall be punished, and criminals warned, and the false humanity that starts and shudders when the axe of justice is ready to strike is a dangerous element for the peace of society." The Court went on to say, "We have had too much of this mercy. It is not true mercy. It only looks to the criminal, but we must insist on mercy to society." And if your Honor please, the Court went on to hold, and in that case, that for criminals to go unpunished is a disgrace to our civilization, and we have reaped the fruits of it in the frequency in which the bloody deed occurs. They said that a "stern, unbending, unflinching administration of the penal laws, without regard to position or sex, that it is the highest mark of civilization, and it is also the surest mode to prevent the commission of offenses.

Id.

5. This case is easily distinguished from Drake, where the improper argument was found to have rendered the sentencing hearing fundamentally unfair. As an initial matter, a comparison of the argument in Drake and the argument made in the instant case, reveals that the latter argument is a more limited, if not rather garbled, version of the former. The prosecutor in Drake specifically invoked the office of the Supreme Court of Georgia in support of his argument. See supra note 4; Drake, _____ F.2d

_____ (M/S at 18). Here, the prosecutor referred only to a "noted justice." The prosecutor in Drake specifically stated that the Supreme Court of Georgia regarded the kind of mercy adverted to as not true mercy. See supra note 4; Drake, _____ F.2d _____ (M/S at 18). Here, no mention was made of mercy, except that society occasionally should be the object of mercy, as well as a criminal defendant. The prosecutor in this case may have tried to quote the Georgia Supreme Court, but he obviously was not successful. Finally, the prosecutor in Drake took pains to note that the quoted passages were taken from Georgia Supreme Court cases involving murder and the death penalty. The prosecutor in this case merely referred to the view of a "noted justice;" no mention was made of the context within which these views were expressed. From the foregoing, we consider the argument in Drake to be a much more severe statement concerning the appropriateness of mercy for a capital crime defendant, and therefore much more prejudicial than the inarticulate argument involved in this case.

6. Given its disposition of the gender discrimination claim, the district court found it unnecessary to address Bowen's companion claim that blacks also were unconstitutionally underrepresented on the traverse jury list.

7. The sixth and fourteenth amendment analyses do differ in one significant respect. To prevail on an equal protection challenge, the defendant must show purposeful discrimination. Duren, 439 U.S. at 368 n.26. Hence, if the defendant makes out a prima facie case, the burden of proof then shifts to the state to show the absence of discriminatory intent. Id.; Castaneda, 430 U.S. at 495; Gibson, 705 F.2d at 1546 n.4. Since, however, discriminatory intent is irrelevant to a fair cross-section challenge, Duren, 439 U.S. at 368 n.26, the state may rebut a sixth amendment prima facie case only be demonstrating "that a significant state interest [is] manifestly and primarily advanced by those aspects of the jury selection process . . . that result in the disproportionate exclusion of a distinctive group." Id. at 367-68 (footnote omitted); see Willis v. Zant, 720 F.2d 1212, 1217 (11th Cir. 1983), cert. denied, 104 S. Ct. 3546 (1984); Gibson, 705 F.2d at 1546 n.4; Perez-Hernandez, 672 F.2d at 1384 n.5.

8. In his habeas petition, Bowen contended that the jury panel which sentenced him to death was drawn from a traverse jury list "composed in violation of the Constitution of the United States." Record, Vol. 1 at 18. Since Bowen failed to specify the constitutional basis for his complaint, the district court stated that it would evaluate the jury composition claim under both the sixth and fourteenth amendments. Id. at 210. The court accordingly set forth in its opinion the Castaneda and Duren tests. Id. at 210-11. Absent from the court's opinion, however, is any discussion of the burden the state must carry to rebut a

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sixth amendment prima facie case or any findings on whether respondent had done so in this case. Because we are wary of reaching an issue not ruled upon by the district court, we base our decision regarding the jury composition issue solely on fourteenth amendment grounds. We note, however, that curiously wanting from the record is any evidence offered by respondent concerning a significant state interest justifying the under-representation of women on the Polk County traverse jury lists. See supra note 7 This is puzzling since the record established prior to the district court's ruling is replete with references to sixth amendment fair cross-section cases. See, e.g., Bowen v. State, 260 S.E.2d at 858 (citation to Duren); Respondent's Brief in Support of Answer and Return, Record, Vol. 1 at 26-29 (same); Magistrate's Report and Recommendation, id. at 136-41 (Duren prima facie case applied to facts of this case). In fact, Bowen, in response to a request by the magistrate, filed a pre-hearing brief in support of his contention that he need not show purposeful discrimination to establish a prima facie case. Brief of Petitioner, id. at 83.

9. The disparities are arrived at by comparing 1970 Census Bureau statistics for Polk County to the Polk County traverse jury lists, which are revised every two years. Respondent does not challenge this methodology. The district court based its ruling on the following breakdown by gender of the traverse jury pools and the county census figures:

1977 TRAVERSE JURY POOL

Class	Number	% of pool	% of population	Disparity
Males	1427	69.7%	47.5%	[+]22.2%
Females	612	29.8	52.5	[-]22.7
Sex Unknown	8	.5	-	-

1975 TRAVERSE JURY POOL

Class	Number	% of pool	% of population	Disparity
Males	1290	70.6%	47.5%	[+]23.1%
Females	533	28.2	52.5	[-]24.3
Sex Unknown	4	2.2	-	-

1973 TRAVERSE JURY POOL

Class	Number	% of pool	% of population	Disparity
Males	1352	86.2%	47.5%	[+]38.7%
Females	217	13.8	52.5	[-]38.7

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1971 TRAVERSE JURY POOL

Class	Number	% of pool	% of population	Disparity
Males	1201	76.7%	47.5%	[+]29.2%
Females	365	23.3	52.5	[-]29.2

1969 TRAVERSE JURY POOL

Class	Number	% of pool	% of population	Disparity
Males	1103	76.5%	47.5%	[+]29.0%
Females	338	23.5	52.5	[-]29.0

Record, Vol. 1 at 212.

10. The Eleventh Circuit, in Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), adopted as precedent decisions of the former Fifth Circuit handed down prior to October 1, 1981. We also are bound by decisions of Unit B of the former Fifth Circuit rendered after that date. Stein v. Reynolds Secs., Inc., 667 F.2d 33, 34 (11th Cir. 1982).

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JOHNSON, Circuit Judge, specially concurring in part and dissenting in part:

I concur in Section IV of the majority opinion, affirming the judgment of the district court in granting petitioner a new sentencing trial because he was sentenced by an unconstitutionally selected jury. I also concur in Section II(a) of the majority opinion, which holds that a Sandstrom violation occurred. However, I dissent from Section II(b) of the opinion, which holds the Sandstrom violation to be harmless error, and Section III, which holds that the petitioner was not prejudiced by improper prosecutorial argument at the sentencing trial.

I. THE SANDSTROM ISSUE

I acknowledge that I am bound by the recent decisions of the en banc court in Davis v. Kemp, 752 F.2d 1515 (11th Cir. 1985) (en banc), and Tucker v. Kemp, No. 83-8466, slip op. 4531 (11th Cir. 1985) (en banc). However, the majority's opinion unjustifiably extends the harmless error concept to a case where the intent of the admitted killer was clearly at issue.

In Davis, the Court identified two circumstances under which the harmless error rule might be applicable to Sandstrom violations: (1) where the evidence of the defendant's guilt was overwhelming, and (2) where the invalid instruction concerned an element of the crime which was not at issue at trial. Id. at 1521; Lamb v. Jernigan, 683 F.2d 1332 (11th Cir. 1982), cert.

denied, 460 U.S. 1024 (1983). In Davis, the faulty instruction concerned the intent of the defendant, but the Court held that the defendant did not contest the issue of intent. See Davis, supra, 752 F.2d at 1521. The Court held that under those circumstances the faulty instruction, which impermissibly shifted the burden of proof on the intent issue to the defendant, was harmless error. In reaching its conclusion, the Court relied heavily on Engle v. Koehler, 707 F.2d 241 (6th Cir. 1983), aff'd by an equally divided court, 104 S.Ct. 1673 (1984) (per curiam), in which the Sixth Circuit held that a Sandstrom violation could be harmless error where the defendant admits that an intentional, malicious killing occurred but claims non-participation in the crime; but that such a violation could not be harmless error where the defendant asserts lack of mens rea. See Davis, supra, 759 F.2d at 1521; Engle, supra, 707 F.2d at 246.

Although intent was not contested in Davis, intent was very much at issue in the instant case. The petitioner raised a temporary insanity defense, which called into question his capacity to form the requisite intent for malice murder. This is the same defense that was raised in Engle, in which the Sixth Circuit held that a Sandstrom violation was not harmless error. 707 F.2d at 246. Nevertheless, the majority holds that the Sandstrom violation, which may have given some jurors the impression that the petitioner had the burden of proving that he lacked the requisite intent for malice murder, was harmless error.

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The majority points out that the faulty jury instruction in this case stated that one is presumed to intend the natural and probable consequences of his acts if he is a person of "sound mind". The majority argues that this presumption could have become operative only if the jury first determined that the petitioner was sane, i.e., if the jury had already rejected the petitioner's insanity defense. The majority concludes that if the presumption had become operative, and the Sandstrom violation thus occurred, the violation was rendered harmless by the fact that petitioner's defense on the issue of intent had already been rejected by the jury.

The majority's analysis fails to address the fact that the State was required to prove not that petitioner had a sound mind but, rather, that he had the requisite intent for malice murder. Even if the jury rejected petitioner's argument of temporary insanity, the issue of intent was not a defense that petitioner had to prove; intent was an element of the crime that the State had the burden of proving beyond a reasonable doubt. Davis, supra, 752 F.2d at 1528 (Johnson, J., dissenting). By arguing that he had a diminished capacity to form the requisite intent for malice murder, defendant did not thereby admit that he had the requisite intent if he had the capacity to form it. Since intent was a contested issue, holding a Sandstrom error harmless in the present case is an unwarranted extension of the "harmless error" rule.

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II. THE PROSECUTORIAL MISCONDUCT ISSUE

In the present case, the prosecutor argued that a "noted justice" had stated that mercy would be an inappropriate consideration for the defendant. The prosecutor implored the jury to "fulfill the commands of the law," and thus inflict the death penalty on the defendant. The majority holds that, despite this concededly improper argument, the prosecutor did not render the sentencing phase of the trial fundamentally unfair, and appellant is not entitled to habeas relief on this ground. The majority relies on the "prejudice" test adopted by this Circuit in the en banc decision Brooks v. Kemp, No. 83-8028, slip op. 4453, 4488 (11th Cir. 1985) (en banc), which held that a court should grant habeas relief for improper prosecutorial argument at the sentencing phase only if there is a reasonable probability that, in the absence of such argument, the death penalty would not have been imposed.

In holding that the improper prosecutorial argument was not grounds for relief, the majority disregards the recent Supreme Court decision in Caldwell v. Mississippi, 52 U.S.L.W. 4743 (U.S. June 11, 1985), in which the Court vacated a death sentence because the prosecutor used the same kind of improper argument that was used in the present case. Because the recent Supreme Court decision rejects the "prejudice" test adopted in Brooks, I dissent from Section III of the majority opinion.

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A. Caldwell Rejects the Brooks Prejudice Test

In vacating the defendant's death sentence because of improper prosecutorial argument, the Caldwell Court applied a prejudice standard that differs significantly from the 11th Circuit standard formulated in Brooks and relied upon by the majority. In Brooks, the en banc court held that to determine whether to grant habeas relief for improper prosecutorial arguments the reviewing court must decide whether there is a reasonable probability that, had the remarks not been made, the sentencing outcome would have been different. Brooks, supra, slip op. at 4475. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Drake v. Kemp, No. 83-8047, slip op. 4577, 4587 (11th Cir. 1985) (en banc); Strickland v. Washington, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 698 (1984).

The basis for the standard adopted in Brooks was the notion that habeas relief should be available only when an error has affected the "fundamental fairness" of the challenged proceeding. This "fundamental fairness" standard originated in Donnelly v. DeChristoforo, 416 U.S. 637 (1974). In that case, the Supreme Court set forth the standard for reviewing habeas corpus petitions raising the impropriety of a state prosecutor's argument in the guilt phase of a noncapital offense. In holding that the relevant inquiry was whether the remark violated due process, the majority stated that "not every trial error or

infirmity ... constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice.'" Brooks, supra, slip op. at 4472, citing Donnelly, 416 U.S. at 642.

In order to elaborate on the fundamental fairness standard, the Brooks Court adopted the prejudice standard used by the Supreme Court in Strickland v. Washington, supra. The Brooks Court held that the Court in Strickland, "while addressing a specific Sixth Amendment violation, recognized that 'fundamental fairness' is the central concern of the writ of habeas corpus." Brooks, supra, slip op. at 4473, citing Strickland, 80 L.Ed.2d at 700. The Brooks Court continued, "Thus, the [Strickland] Court acknowledged that fundamental fairness, the same standard adopted in Donnelly, is the governing principle in reviewing errors of counsel. The [Strickland Court's] use of the 'reasonable probability' test to elaborate the underlying principle suggests its applicability to other areas in which fundamental fairness is the guide." Brooks, supra, slip op. at 4474. In short, Brooks held that the standard used to test fundamental fairness in the context of ineffective assistance of counsel claims is equally applicable in the context of prosecutorial misconduct claims in capital cases.

In support of its adoption of the "reasonable probability" test, the Brooks Court argued that that test was "consistent with the standards discussed in Donnelly and with subsequent cases applying the fundamental fairness standard." Id. The Court claimed that those cases indicated that, in determining whether improper argument had a prejudicial impact on the sentencing

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proceeding, it was necessary to look beyond the types of argument used and to look at the strength of the evidence as well. The Court concluded, "Even argument greatly exceeding the bounds of propriety will not be fundamentally unfair in the guilt phase of a case with overwhelming evidence because of the low probability of the argument's impact." Id. at 4474-75 (footnote omitted).

The majority in the present case relies on the standard adopted in Brooks in determining that the improper prosecutorial argument was not a ground for vacating the death sentence. The majority holds that there was no reasonable probability that, absent the improper statements of the prosecutor, Bowen would not have been sentenced to death. Supra at 20.

In concluding that the prosecutor's remarks required reversal of the death sentence, the Caldwell Court did not refer to a "reasonable probability" standard. The Court consistently emphasized that the Eighth Amendment requires a heightened standard of reliability in the capital sentencing decision. See Caldwell, supra, 53 U.S.L.W. at 4745, 4748. The Court concluded, "Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." Id. at 4748.

The "reasonable probability" test adopted by the en banc court in Brooks is incompatible with Caldwell for three reasons. First, the "reasonable probability" test is inconsistent with the Caldwell Court's language in the final section of the majority opinion. The Court held that, for the sentencing phase to satisfy the Eighth Amendment's heightened standard of

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reliability, the reviewing court must be able to say that the improper argument "had no effect on the sentencing decision." Id. This is a far more difficult standard for the State to satisfy than the Brooks standard. Unlike the Brooks standard, which places the burden on the defendant to show prejudice, the Caldwell standard places the burden of proving the absence of prejudice on the State. Prejudice will be presumed unless the reviewing court can say that the improper argument had no effect on the jury's decision. See id. In addition, the State cannot overcome this presumption merely by showing that there is a "reasonable probability" that the improper argument did not affect the outcome. The State must prove that the improper argument "had no effect."

The second reason the Brooks standard is incompatible with Caldwell is that Brooks treated the "reasonable probability" test as a monolithic standard to be applied in every habeas corpus proceeding, regardless of whether the error complained of occurred under the Fifth, Sixth, or Eighth Amendment. See Brooks, supra, slip op. at 4471-74. In specifically alluding to the heightened need for reliability in the capital sentencing phase required by the Eighth Amendment, the Caldwell Court suggested that different prejudice tests are required for the various types of constitutional challenges to the fundamental fairness of a state trial. Caldwell, supra, 53 U.S.L.W. at 4748.

The third reason the Brooks standard should no longer be followed is that, although that standard requires a reviewing court to take into account the strength of the evidence against

the defendant, Brooks, supra, slip. op. at 4474-75, the Caldwell Court looked solely at the type of argument used, in the context of the entire argument and instructions, in determining whether the sentencing phase might have been rendered unfair. The Caldwell Court did not take the strength of the evidence into account at all in determining whether the improper argument affected the fairness of the sentencing phase. See Caldwell, supra, 53 U.S.L.W. at 4747-48. On the contrary, the Court suggested that a reviewing court could not accurately determine whether a jury might have returned a different sentence in the absence of improper argument. The Court said, "It is beyond question that an appellate court, performing its task with a presumption of correctness, would be relatively incapable of evaluating the 'literally countless factors that [a capital sentencer] consider[s]' ... in making what is largely a moral judgment of the defendant's desert." Id. at 4748 n.7 (citation omitted). In short, the Caldwell Court applied a prejudice standard more closely resembling the harmless error test of Chapman v. California, 386 U.S. 18 (1967), than the prejudice test of Strickland.

In addition to indicating that the Brooks prejudice standard was wrongly adopted, Caldwell indicates specific flaws in the way the Brooks standard has been applied. The dissent in Caldwell argued that the impact of the prosecutor's argument regarding appellate review was mitigated by later prosecutorial comments that the jury played an important role in the sentencing process. Caldwell, supra, 53 U.S.L.W. at 4751 (Rehnquist, J.,

dissenting). However, the majority explicitly rejected this argument of the dissent, on the grounds that, "even if the prosecutor's later comments did leave the jury with [the] view that they had an important role to play, the prosecutor did not retract, or even undermine, his previous [improper comment]." Caldwell, supra, 53 U.S.L.W. at 4748 n.7. The Court also emphasized the fact that the trial judge failed to issue strong curative instructions directed specifically at the improper argument. Id. at 4748.

The majority in the present case places heavy emphasis on the fact that "[a]ny prejudice from the improper remarks was for the most part alleviated by other statements of the prosecutor and the judge's charge." Supra at 20. The majority ignores the significance of the fact that neither the trial judge nor the prosecutor made any attempt to cure or retract the specific remarks that the majority concedes were improper. Yet, Caldwell clearly holds that general remarks to the effect that the jury bears responsibility for the sentencing decision are not sufficient to cure the prejudice caused by improper prosecutorial arguments aimed at diminishing the jury's sense of responsibility. Caldwell, supra, 53 U.S.L.W. at 4748 n.7.

B. Caldwell Controls the Outcome in the Present Case

In Caldwell, the prosecutor argued that the jury would not bear responsibility for the imposition of a death sentence, because a death sentence would automatically be reviewed by an appellate court. The Court said that a capital sentencing jury, made up of individuals placed in a very unfamiliar situation and

called on to make a very difficult and uncomfortable choice, might welcome the opportunity to diminish the importance of its role and delegate its decision making authority to others. The Court said,

> This problem is especially serious when the jury is told that the alternative decision makers are the justices of the state supreme court. It is certainly plausible to believe that many jurors will be tempted to view these respected legal authorities as having more of a "right" to make such an important decision than has the jury.

Id. at 4746.

The essence of the impropriety in Caldwell was the implication in the prosecutor's argument that the jury did not have the primary responsibility for deciding whether the death sentence was appropriate but, rather, that the jury had a duty to impose the death sentence in order to give effect to the decision of other authorities who were better able to judge the appropriateness of that penalty. Such authorities might include not only the justices of a state supreme court but also the prosecutor, grand jury, or police.

In the present case the prosecutor argued not only that a noted state supreme court justice had already determined that the death penalty was appropriate for the defendant, but also that the law itself commanded such a sentence. This argument went beyond what the Court condemned in Caldwell. Since the danger that the jury might choose to minimize the importance of its role was at least as high in the present case as it was in Caldwell, the analysis the Supreme Court used in deciding to vacate the

death sentence in Caldwell should control the outcome in the present case. Because we cannot say that the improper arguments in the present case had no effect on the jury's sentencing decision, I dissent.

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YOUNG, District Judge, concurring in part and dissenting in part:

While concurring in the Court's analysis and conclusion on each of the Sandstrom and the closing argument issues, I disagree that the petitioner is entitled to relief based on an alleged Fourteenth Amendment violation because of underrepresentation of women in the sentencing jury pool.

As the Court points out, challenges by criminal defendants in state court proceedings to the discriminatory selection of juries have been recognized under the Equal Protection Clause of the Fourteenth Amendment and the "fair cross-section" requirement implicit in the Sixth Amendment right to an impartial jury. The district court below held that Bowen, a male convicted of raping and murdering a twelve year old female, was denied equal protection of the laws in his sentencing because females were underrepresented on the 1977 traverse jury list from which his sentencing jury was selected. The district court thus found it unnecessary to evaluate Bowen's claim under the Sixth Amendment. In affirming the district court, the majority likewise purports to reach only the Fourteenth Amendment question.

In my opinion, both logic and Supreme Court precedent compel the conclusion that Bowen lacks standing to assert, on equal protection grounds, that women were underrepresented in the jury pool. In this regard, I would adopt the reasoning of Judge Gee, writing for the new Fifth Circuit, in United States v. Cronn, 717 F.2d 164 (5th Cir. 1983). Petitioner's own equal protection rights obviously were not violated in this case by the alleged underrepresentation of women, and there is no

justification for permitting jus tertii standing. Id. at 169-170.

I recognize that this Circuit has reached a contrary result in a line of cases beginning with United States v. Perez-Hernandez, 672 F.2d 1380, 1385-86 (11th Cir. 1952), which, like Cronn, involve equal protection challenges to the selection of the grand jury foremen. See also United States v. Holman, 680 F.2d 1340, 1355-56 (11th Cir. 1982); United States v. Cross, 780 F.2d 631, 633-34 (11th Cir. 1983); United States v. Sneed, 729 F.2d 1333, 1334 (11th Cir. 1984). The Fifth Circuit in Cronn persuasively points out that the "apparent conflict" among recent Supreme Court decisions, which this Court perceived in Perez-Hernandez, stems from a misreading of Justice Marshall's plurality opinion in Peters v. Kiff, 407 U.S. 493 (1972). The Peters opinion did not discuss standing "in an equal protection context," as Perez-Hernandez states (672 F.2d at 1385); indeed, the Peters Court did not reach the equal protection issue. 407 U.S. at 497 n.5. The discussion of standing in Peters pertains, rather, to grand jury composition challenges under the due process clause which -- like Sixth Amendment, fair cross-section challenges to petit jury composition -- may be raised by any criminal defendant, regardless of his circumstances. Id. at 504. See Cronn, 717 F.2d at 167-68, and nn. 4 and 6. Chief Justice Burger's dissent in Peters noted: "While the opinion of Mr. Justice Marshal refrains from relying on the Equal Protection Clause, it concludes that if petitioner's allegations

are true, he has been denied due process of law." 407 U.S. at 509. In United States v. Cross, 708 F.2d at 633 n.4, this Court acknowledged that the Peters plurality opinion "analyzed the exclusion of blacks from grand jury service as a violation of due process." (Emphasis added).

On the other hand, in the equal protection cases of Castenada v. Partida, 430 U.S. 482, 494 (1977), and Rose v. Mitchell, 443 U.S. 545, 565 (1979), the Supreme Court unequivocally stated that

> "in order to show an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or the identifiable group to which he belongs."

(Emphasis Added).

But whether Perez and its progeny were decided correctly or not, this panel is bound by it in the absence of a reversal by the Eleventh Circuit en banc or by an intervening contrary decision by the Supreme Court. United States v. Holman, 680 F.2d at 1356 n.11. I construe Hobby v. United States, 468 U.S. ___, 82 L.Ed.2d 260 (1984), as a contrary intervening decision which mandates a re-assessment of the Perez holding.

In Hobby, the Supreme Court evaluated the challenge of a white male to the underrepresentation of blacks and women in the position of grand jury foreman as a due process challenge. In holding that such discrimination would not warrant reversal of

petitioner's conviction and dismissal of the indictment against him, the Supreme Court sought to distinguished its previous ruling in Rose v. Mitchell, supra, as follows:

> "Petitioners' reliance upon Rose is misplaced. Rose involved a claim brought by two Negro defendants under the Equal Protection Clause. As members of the class allegedly excluded from service as grand jury foremen, the Rose defendants had suffered the injuries of stigmatization and prejudice associated with racial discrimination. The Equal Protection Clause has long been held to provide a mechanism for the vindication of such claims in the context of challenges to grand and petit juries. See, e.g., Castaneda v. Partida, 430 U.S. 482 (1977); Hernandez v. Texas, 347 U.S. 475 (1954); Strauder v. West Virginia, 100 U.S. 303 (1880). Petitioner, however, has alleged only that the exclusion of women and Negroes from the position of grand jury foreman violates his right to fundamental fairness under the Due Process Clause. As we have noted, discrimination in the selection of federal grand jury foreman cannot be said to have a significant impact upon the due process interests of criminal defendants. Thus, the nature of petitioner's alleged injury and the constitutional basis of his claim distinguish his circumstances from those of the defendants in Rose.
>
> * * *
>
> Given the nature of the constitutional injury in Rose, the peculiar manner in which the Tennessee grand jury selection operated, and authority granted to the one who served as foreman, the Court assumed in Rose that discrimination with regard to the foreman's selection would require the setting aside of a subsequent conviction, "just as if the discrimination proved has tainted the selection of the entire grand jury venire." Rose v. Mitchell, supra, at 551-552, n.4. No such assumption is appropriate here, however, in the very different context of the due process challenge by a white male to the selection of foremen of federal grand juries."

82 L.Ed.2d at 267-269.

Hobby, then, makes clear and firm the Supreme Court's previously stated requirement that a petitioner seeking to raise an equal protection challenge must be a member of the race or group allegedly underrepresented on juries or grand juries. By implication, one who is not a member of the underrepresented group lacks standing to raise such a challenge.

In addition, Hobby demonstrates that there is a difference in the evaluation of a due process violation claim from that of an equal protection violation claim. Discrimination in selection of a grand jury foreman could be an equal protection violation (Rose v. Mitchell, supra) but would not be a due process violation (Hobby v. United States, supra). Likewise, there may, in some cases of jury composition disparities, be a difference in the results depending upon whether the challenges are examined under the Fourteenth Amendment equal protection standard or the Sixth Amendment fair cross-section standard. Judge Fay has, for this Court, rested his decision solely on the Fourteenth Amendment claim and declined to decide the Sixth Amendment challenge in the absence of findings or a ruling by the district judge on that issue.

For the reasons set forth above, I dissent to Part IV of the majority opinion; I would reverse the district court's grant of a new sentencing trial and would remand for a consideration of the issues unresolved in the district court including, but not limited to, the Sixth Amendment fair cross-section claim.

Names Of Witnesses.	Addresses	Employed By
Mrs. Edith Hill	3040 New Tampa Hwy. Lakeland	Housewife
Mrs. Helen Turman (45) 5-11-28	3070 New Tampa Hwy. Lakeland, Fla.	

Arrest Record— Names	Case Number	Date	Arresting Officers

Personal Property On Body In Possession Of

DETAILED REPORT—Give complete account including story obtained from injured person if in condition to be interviewed. In a felony case obtain statement from complainant and have complainant sign his statement. Also get statement from each witness and signatures. Any report, officer making this report must not fail to state his source of information even though it is his own statement. Commanding officer of all officers is required to determine if victim, or complainant, desires to prosecute and advise them where to obtain warrant.

Mrs. Turman was in her and her husband, James', furniture store, which is located in front of their home at 3070 New Tampa Hwy.; at or about 6:00 p.m., Mr. James Carl Turman, left to go to the house to the south of the store. This left Mrs. Helen Turman alone. She went to the back do south side of store. As Mrs. Turman turned to go back into the store, sh found a colored man standing in the hallway. Mrs. Turman stated she could not remember what the subject looked like or what he was wearing. The subject informed Mrs. Turman that he wanted to buy about $600.00 worth of furniture. Mrs. Turman started to show the subject around the store. The went into what they called the storeroom. At this time, the subject had a gun in his left hand, took Mrs. Turman by the right arm. He was behind h at this time. She turned to her left some and saw a gun in his hand. The subject said at this time, 'do as I tell you and you won't get hurt.' The

four days after the incident. We should have waived the preliminary hearing and demanded a lineup, or simply waived the preliminary hearing. Because of the photograph of Darden in the local newspaper the day after the murder it perhaps would have been advisable to have no lineup.

It most certainly was inadvisable to have the preliminary hearing.

Q Why do you say that was a bad decision? What happened, in other words, at the Preliminary Hearing to prejudice the defendant's trial?

A The widow was especially distraught. She had just come from her husband's funeral the day before. She was brought into a tiny courtroom where there was one black man sitting at the defense table. The prosecutor walked over to him and pointed to him and said, "Is this the man that did it?"

She looked him straight in the eye and said, "That's the man that did it" -- over vigorous objection of Defense Counsel Hill.

Mrs. Turman is a very, I thought, honest witness and honest person. I do believe that had she not seen Darden until the day of the trial, if she didn't recognize him, she would have said something. She should not have been able to see Darden prior to

Classification	SHERIFF'S OFFICE SUPPLEMENTARY REPORT MONROE BRANNEN, SHERIFF POLK COUNTY, BARTOW, FLORIDA	Complaint No.

9-11-73
5:00 p.m.

"Both of these two look a little like him!"

DID HE HAVE A MUSTACHE?

"I don't think so!"

WHAT TYPE SHIRT WAS HE WEARING?

"It was short sleeve. It was something like a red or orange and I think it was a knit material, pale!"

WRITE WHAT IS IN THE FACE PLATE OF THE PHOTO YOU CHOSE?

"Sheriff's Dept.
Bartow, Florida
4644
9 9 73

/s/ Phillip Arnold

Witness: D. R. Neal, Polk County Sheriff's Dept.

C. R. Keeney, Polk County Sheriff's Dept.

Investigating Officers:	Date

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing was served on

The Honorable Jim Smith
Attorney General
Elliott Building
Tallahassee, Florida 32301 by hand/~~mail~~

and

Mr. Richrd W. Prospect
Assistant Attorney General
125 North Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014 by ~~hand~~/mail

this 01 day of September, 1985.

Respectfully submitted

ROBERT AUGUSTUS HARPER, JR.
Law Firm
317 East Park Avenue
Post Office Box 10132
Tallahassee, Florida 32302
904/224-5900

RAHb/

IN THE UNITED STATES COURT OF APPEALS
OR THE ELEVENTH CIRCUIT

NO. 81-5590

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUG 30 1985
SPENCER D. MERCER
CLERK

WILLIAM JASPER DARDEN

Petitioner-Appellant,
Cross-Respondent,

versus

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections, State
of Florida,

Respondent-Appellee,
Cross-Petitioner,

Appeal from the United States District Court
For the Middle District of Florida

Before GODBOLD, Chief Judge, RONEY, TJOFLAT,* HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges, and MORGAN, Senior Circuit Judge.**

O R D E R:

Darden's motion, filed August 29, 1985, to stay the mandate for 30 days and stay his execution pending application for certiorari, is DENIED.

* Circuit Judge Gerald Bard Tjoflat did not participate in this decision.

** Circuit Judge Joseph W. Hatchett, having recused himself, did not participate in this decision. Senior Circuit Judge Lewis R. Morgan elected to participate in this decision pursuant to 28 U.S.C. § 46(c)